Supreme Court, U.S.
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No. 15-1391

In the Supreme Court of the United States

EXPRESSIONS HAIR DESIGN, *et al.*,
Petitioners,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

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Certiorari Granted September 29, 2016

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Order of the United States District Court for the Southern District of New York on Motion for Preliminary Injunction (October 3, 2013) ..... App. 55a

U.S. District Court for the
Southern District of New York (Foley Square)
Civil Docket for Case No. 1:13-cv-03775-JSR
Expressions Hair Design et al. v. Schneiderman

Date	Docket Number	Docket Text
06/04/2013	1	COMPLAINT against Eric T. Schneiderman. * * * *
06/14/2013		Minute Entry for proceedings held before Judge Jed S. Rakoff: Initial Pretrial Conference held on 6/14/2013. * * * *
06/17/2013	11	MOTION for Preliminary Injunction. * * * *
06/17/2013	12	AFFIDAVIT of Linda Fiacco in Support re: 11 MOTION for Preliminary Injunction.. * * * *
06/17/2013	13	DECLARATION of Peter Freeman in Support re: 11 MOTION for Preliminary Injunction.. * * * *
06/17/2013	14	DECLARATION of Donna Pabst in Support re: 11 MOTION for Preliminary Injunction.. * * * *
06/17/2013	15	DECLARATION of Steve Milles in Support re: 11

Date	Docket Number	Docket Text
		MOTION for Preliminary Injunction.. * * * *
06/17/2013	16	DECLARATION of David Ross in Support re: 11 MOTION for Preliminary Injunction.. * * * *
06/17/2013	17	DECLARATION of Deepak Gupta in Support re: 11 MOTION for Preliminary Injunction.. * * * * (Attachments: # 1 Exhibit A: Letters from Consumers Union and Consumer Federation, # 2 Exhibit B: N.Y. Legislative History, # 3 Exhibit C: 2008 N.Y. Insurance Dep't Opinion, # 4 Exhibit D: N.Y. Atty. Gen'l Press Release, # 5 Exhibit E: Excerpt from Connecticut Legislative History, # 6 Exhibit F: N.Y. Atty. Gen'l Formal Opinion (2006), # 7 Exhibit G: 2007 N.Y. Insurance Dep't Opinion) * * * *
06/17/2013	18	MEMORANDUM OF LAW in Support re: 11 MOTION for Preliminary Injunction.. * * * *
06/26/2013	22	ORDER granting 20 Motion for Leave to File Document;

Date	Docket Number	Docket Text
		granting 21 Motion for submit briefs as amici curiae. This action is brought by a group of small retailers and their owners against the Attorney General of New York challenging the constitutionality of a New York statute, N.Y. Gen. Bus. Law 518, which provides that "[n]o seller in any sales transaction may impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." Plaintiffs assert that this statute violates the First Amendment, is unconstitutionally vague, and is preempted by federal antitrust laws, and have moved for a preliminary injunction. Now pending before the Court are motions by two groups of nonparties ––– three large national retailers, and four consumer protection organizations ––– seeking leave to submit briefs as amici curiae in support of plaintiffs' motion. In a telephone conference with all relevant counsel on June 20, 2013, the parties indicated that these motions are unopposed. Upon review, the Court finds that the

Date	Docket Number	Docket Text
		proposed briefs will likely "prove helpful to the Court in shedding light on those aspects of the case that the immediate parties may not best situated to address." Weininger v. Castro, 418 F. Supp. 2d 553, 555 (S.D.N.Y. 2006). In particular, the consumer protection organizations may illuminate the statute's effect on consumers, and the large retailers may shed light on the statute's effect on their negotiations with credit card companies over swipe fees. Accordingly, the pending motions for leave to file briefs as amici curiae are hereby granted. The proposed briefs shall be filed no later than July 1, 2013. The Clerk of the Court is directed to close documents numbered 20 and 21 on the docket of this case. SO ORDERED. (Signed by Judge Jed S. Rakoff on 6/26/2013) (rsh) (Entered: 06/26/2013)
07/01/2013	23	BRIEF of *Amici Curiae in Support of Motion for Preliminary Injunction.* Document filed by Safeway Inc., The Kroger Co., Walgreen Co..(Levy, Scott) (Entered: 07/01/2013)

Date	Docket Number	Docket Text
07/01/2013	25	BRIEF of *Amici Curiae in Support of Plaintiffs' Motion for a Preliminary Injunction.* Document filed by Consumer Action, National Association of Consumer Advocates, National Consumers League, U.S. Public Interest Research Group.(Richards, John) (Entered: 07/01/2013)
07/12/2013	26	MOTION to Dismiss. Document filed by Eric T. Schneiderman. * * * *
07/12/2013	27	MEMORANDUM OF LAW in Support re: 26 MOTION to Dismiss., 11 MOTION for Preliminary Injunction.. * * * *
07/15/2013	28	FIRST AMENDED COMPLAINT amending 1 Complaint, against Charles J. Hynes, Gerald Mollen, Eric T. Schneiderman, Cyrus R. Vance Jr.. * * * *
07/29/2013	38	DECLARATION of Donna Zasowski in Support re: 11 MOTION for Preliminary Injunction.. * * * *
07/29/2013	39	DECLARATION of Kevin Rooney in Support re: 11 MOTION for Preliminary

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07/29/2013	40	DECLARATION of Michael Parisi (Corrected) in Support re: 11 MOTION for Preliminary Injunction.. * * * *
07/29/2013	41	DECLARATION of Nicholas J. Damadeo (Corrected) in Support re: 11 MOTION for Preliminary Injunction.. * * * *
07/29/2013	42	DECLARATION of Stephen Milles – Supplemental (Corrected) in Support re: 11 MOTION for Preliminary Injunction.. * * * *
07/29/2013	43	DECLARATION of Linda Fiacco – Supplemental (Corrected) in Support re: 11 MOTION for Preliminary Injunction.. * * * *
07/29/2013	44	DECLARATION of Deepak Gupta – Second Declaration in Support re: 11 MOTION for Preliminary Injunction.. * * * * (Attachments: # 1 Exhibit A: Assurance of Discontinuance Between Parkside Fuel and NY

Date	Docket Number	Docket Text
		Attorney General, # 2 Exhibit B: Assurance of Discontinuance Between Napco Oil Heat and NY Attorney General, # 3 Exhibit C: Assurance of Discontinuance Between Rocky &Marciano and NY Attorney General, # 4 Exhibit D: Press Release, "Attorney General Cuomo Issues Consumer Alert..." (Aug. 28, 2008), # 5 Exhibit E: Press Release, "Attorney General Announces Investigation..." (Aug. 21, 2008), # 6 Exhibit F: Press Release, "Attorney General Announces..." (May 8, 2009), # 7 Exhibit G: Press Release, "Attorney General Cuomo Stops Oneida County Used Car Dealer..." (June 1, 2009), # 8 Exhibit H: Press Release, "Attorney General Cuomo's Investigation Prompts 14..." (Sept. 14, 2009), # 9 Exhibit I: Cease−and−Desist Letter to Valero Gas Station from NY Attorney General)(Gupta, Deepak) (Entered: 07/29/2013)
07/29/2013	45	REPLY MEMORANDUM OF LAW in Support re: 11 MOTION for Preliminary Injunction. and in Opposition to Defendant's Motion to Dismiss.

Date	Docket Number	Docket Text
		* * * *
07/30/2013	46	DECLARATION of John Conover (Corrected) in Support re: 11 MOTION for Preliminary Injunction..
		* * * *
08/07/2013	49	MOTION to Dismiss. Document filed by Charles J. Hynes, Cyrus R. Vance Jr..
		* * * *
08/12/2013	52	SUPPLEMENTAL MEMORANDUM OF LAW in Support re: 11 MOTION for Preliminary Injunction..
		* * * *
08/14/2013		Minute Entry for proceedings held before Judge Jed S. Rakoff: Oral Argument held on 8/14/2013 re: 49 MOTION to Dismiss. filed by Charles J. Hynes, Cyrus R. Vance Jr., 26 MOTION to Dismiss. filed by Eric T. Schneiderman, 11 MOTION for Preliminary Injunction.
		* * * *
08/15/2013	56	ORDER: Now pending before the Court are plaintiffs' motion for a preliminary injunction against defendant the Attorney General of the State of New York and defendants' motion to dismiss. After these motions

Date	Docket Number	Docket Text
		were filed, plaintiffs filed a First Amended Complaint, maintaining the same claims against the Attorney General, but adding three county District Attorneys as new defendants. On July 31, 2013, on consent of the parties, the Court deemed the Attorney General's previously filed motion to dismiss to be directed against the First Amended Complaint, and on August 7, 2013, the District Attorneys joined in that motion to dismiss. On consent of the parties, the Court hereby deems plaintiffs' previously filed motion to seek a preliminary injunction against the District Attorneys in addition to the Attorney General. To the extent the District Attorneys wish to make arguments not presented in the papers already submitted by the Attorney General, answering papers to the motion are due no later than August 28, 2013, with plaintiffs' reply papers due no later than September 4, 2013 (Signed by Judge Jed S. Rakoff on 8/14/2013) (js) Modified on 8/15/2013 (js). (Entered: 08/15/2013)

Date	Docket Number	Docket Text
08/27/2013	59	SUPPLEMENTAL REPLY MEMORANDUM OF LAW in Support re: 11 MOTION for Preliminary Injunction.. * * * *
10/03/2013	63	PRELIMINARY INJUNCTION OPINION AND ORDER: #103662 Accordingly, for the foregoing reasons, the Court hereby preliminarily enjoins the defendants from enforcing section 518 of the New York General Business Law during the pendency of this case, and denies defendants' motion to dismiss in full. In addition, the stay of proceedings imposed on August 14, 2013 is hereby lifted. The parties are directed, within one week of the date of this order, to jointly telephone Chambers to schedule further proceedings in this case. The Clerk of the Court is directed to close documents numbered 26 and 49 on the docket of this case. So Ordered (Signed by Judge Jed S. Rakoff on 10/3/2013) (js) Modified on 10/9/2013 (ca). (Entered: 10/03/2013)
10/25/2013	64	NOTICE of Stipulated Final Judgment. Document filed by

Date	Docket Number	Docket Text
		Eric T. Schneiderman. (Meier, Andrew) (Entered: 10/25/2013)
11/04/2013	65	STIPULATED FINAL JUDGMENT AND PERMANENT INJUNCTION that: (a) This stipulated final judgment is hereby granted; (b) The judgment in favor of plaintiffs rendered by the Court in this stipulated final judgment shall be entered as a final judgment and the clerk is directed to enter such judgment immediately; and (c) It is expressly determined that there is no just reason for delay in this entry of a final judgment on the plaintiffs' First Amendment and Fourteenth Amendment claims pursuant to Rule 54(b). These constitutional claims present legal issues that are independent of the plaintiffs' antitrust preemption claim, which is subject to a fact intensive rule of reason analysis. An immediate appeal of these constitutional claims may avert further litigation on the antitrust preemption claim, thereby avoiding the high costs of fact and expert discovery, motion practice, and potentially a trial. Entry of a final judgment

Date	Docket Number	Docket Text
		on the First Amendment and Fourteenth Amendment claims therefore will be efficient and fair for the court and the parties. (Signed by Judge Jed S. Rakoff on 11/4/13) (Attachments: # 1 Notice of Right to Appeal)(ml) (Entered: 11/05/2013)
12/02/2013	66	NOTICE OF APPEAL from 65 Judgment,,,,,. Document filed by Eric T. Schneiderman. * * * *
12/02/2013	67	NOTICE OF APPEAL from 65 Judgment,,,,,. Document filed by Charles J. Hynes, Cyrus R. Vance Jr.. * * * *

United States Court of Appeals for the Second Circuit
Court of Appeals Docket #: 13-4533
Expressions Hair Design v. Schneiderman

Date	Docket Number	Docket Text
12/02/2013	1	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Eric T. Schneiderman, FILED. [1105665] [13-4533] [Entered: 12/03/2013 03:21 PM]
12/02/2013	5	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellants District Attorney Charles J. Hynes and Cyrus R. Vance, Jr., FILED. [1105783] [13-4537] [Entered: 12/03/2013 03:52 PM]
03/18/2014	59	CORRECTED BRIEF, on behalf of Appellant Eric T. Schneiderman in 13-4533, Eric T. Schneiderman in 13- 4537, FILED. Service date 03/18/2014 by CM/ECF. [1181042] [13-4533, 13-4537] [Entered: 03/18/2014 06:40 PM]
03/19/2014	62	CORRECTED BRIEF, on behalf of Appellant District Attorney Charles J. Hynes and Cyrus R. Vance, Jr. in 13-4537, FILED. Service date 03/19/2014 by CM/ECF. [1182286] [13-4533, 13-4537] [Entered: 03/19/2014 06:02 PM]

Date	Docket Number	Docket Text
04/11/2014	86	AMICUS BRIEF, on behalf of Amicus Curiae Credit Union Association of New York, FILED. Service date 04/11/2014 by CM/ECF. [1200383] [13-4533]--[Edited 04/15/2014 by JW] [Entered: 04/11/2014 03:07 PM]
06/20/2014	102	AMICUS BRIEF, on behalf of Amicus Curiae The Kroger Co., Safeway Inc., Walgreen Co., Food Lion, LLC, Hy-Vee, Inc., H.E. Butt Grocery Company, The Great Atlantic & Pacific Tea Company, Inc., Albertson's LLC and Rite Aid Corporation, FILED. Service date 06/20/2014 by CM/ECF. [1254053] [13-4533]--[Edited 06/30/2014 by KG] [Entered: 06/20/2014 03:53 PM]
06/26/2014	111	CORRECTED BRIEF, on behalf of Appellee Bunda Starr Corp., Expressions Hair Design, Linda Fiacco, Five Points Academy, Peter Freeman, Steve Milles, Donna Pabst, Patio.com LLC, David Ross and The Brooklyn Farmacy & Soda Fountain, Inc, FILED. Service date 06/26/2014 by CM/ECF. [1258312] [13-4533] [Entered: 06/26/2014 01:03 PM]

Date	Docket Number	Docket Text
06/25/2015	115	REPLY BRIEF, on behalf of Appellant Eric T. Schneiderman, FILED. Service date 06/27/2014 by CM/ECF. [1259753] [13-4533, 13-4537] [Entered: 06/27/2014 08:07 PM]
07/01/2014	119	AMICUS BRIEF, on behalf of Amicus Curiae Consumer Action, National Association of Consumer Advocates, National Consumer League and U.S. Public Interest Research Group, FILED. Service date 07/01/2014 by CM/ECF. [1261630] [13-4533]--[Edited 07/02/2014 by JW] [Entered: 07/01/2014 01:24 PM]
03/05/2015	169	CASE, before RCW, DAL, SLC, C.JJ., HEARD.[1453420] [13-4533, 13-4537] [Entered: 03/05/2015 12:14 PM]
09/29/2015	180	OPINION, vacating the district court judgment and remanding for the dismissal of plaintiffs' claims, by RCW, DAL, SLC, C.JJ., FILED.[1608356] [13-4533, 13-4537] [Entered: 09/29/2015 09:23 AM]
09/29/2015	185	JUDGMENT, FILED.[1609006] [13-4533, 13-4537] [Entered: 09/29/2015 03:27 PM]

Date	Docket Number	Docket Text
11/19/2015	197	PETITION FOR REHEARING/REHEARING EN BANC, on behalf of Appellee Bunda Starr Corp., Expressions Hair Design, Linda Fiacco, Five Points Academy, Peter Freeman, Steve Milles, Donna Pabst, Patio.com LLC, David Ross and The Brooklyn Farmacy & Soda Fountain, Inc in 13-4533, 13-4537, FILED. Service date 11/19/2015 by CM/ECF.[1645967] [13-4533, 13-4537] [Entered: 11/19/2015 10:27 AM]
12/11/2015	210	AMENDED OPINION, by RCW, DAL, SLC, C.JJ., FILED.[1661611] [13-4533, 13-4537] [Entered: 12/11/2015 09:19 AM]
01/12/2016	217	ORDER, petition for rehearing en banc denied, FILED.[1683596] [13-4533, 13-4537] [Entered: 01/13/2016 04:13 PM]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS,

Plaintiffs,

v.

ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, CYRUS R. VANCE, JR., in his official capacity as District Attorney of New York County, CHARLES J. HYNES, in his official capacity as District Attorney of Kings County, and GERALD F. MOLLEN, in his official capacity as District Attorney of Broome County,

Defendants.

No. 13-CIV-3775 (JSR)

FIRST AMENDED COMPLAINT

Introduction

Every time a consumer uses a credit card to make a purchase, the merchant incurs a fee—known colloquially as a "swipe fee." These fees are typically passed on to all consumers in the form of higher prices for goods and services. Both state and federal law, however, permit merchants to pass swipe fees on to only those consumers who pay with credit cards. Merchants may charge two different prices depending on which payment method the consumer uses: a higher price for using a credit card, and a lower price for using other payment methods (cash, a personal check, or a debit card). But, in New York, merchants may engage in dual pricing only if they communicate the difference between the cash price and the credit price using the right *language*: The state allows merchants to offer "discounts" for using cash or a debit card, yet makes it a criminal offense to impose "surcharges" for using a credit card—even though the conduct in both cases (the use of dual pricing) is the same.

This New York no-surcharge law, N.Y. Gen. Bus. Law § 518, violates the First Amendment to the U.S. Constitution, is unconstitutionally vague, and is preempted by federal antitrust law. The plaintiffs are merchants who seek a declaration that the law is unconstitutional and an injunction preventing the State of New York from enforcing the law against them.

Jurisdiction

1. This Court has jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3).

Parties

2. Plaintiff Expressions Hair Design is a unisex hair salon in Vestal, New York, founded in 2006. For a small business like Expressions, credit-card swipe fees make

an enormous difference. Expressions has found that most of its customers are not aware of the high cost of swipe fees or the ways in which they burden small businesses. But when they learn of the fees, customers are generally sympathetic. Expressions therefore seeks to do what it can to ensure that its customers learn about the cost of using credit cards and take that information into account in deciding how to pay for haircuts and other salon services. Ultimately, Expressions wants credit-card companies to reduce their swipe fees, either as a result of market forces or action by Congress, and is hopeful that educating its customers about swipe fees will cause them to act—both as consumers and as citizens.

3. Until 2012, Expressions posted a sign at its counter informing all customers that, due to the high swipe fees charged by the credit-card industry, Expressions would charge customers 3% more for using a credit card. But Expressions took down its sign and stopped communicating that policy to its customers when one customer (who is also a lawyer) informed the salon that New York law makes it illegal to impose a "surcharge" on customers for paying with a credit card (even though merchants are allowed to provide a "discount" for paying with cash, check, or debit card). Because of the New York no-surcharge law, the salon's current policy is to charge two different prices for haircuts and other services—a lower price for customers paying with cash, check, or debit card and a higher price for customers paying with a credit card. Expressions tries to be as careful as it can to avoid characterizing that price difference as a "surcharge" or an "extra" charge for paying with a credit card, even though its customers *do* effectively pay more for using a credit card.

4. By engaging in dual pricing, Expressions increases its prices to account for the cost of credit cards

(which New York permits) and does so only for those who use credit cards (which New York also permits). But Expressions cannot communicate its price difference in the way that it would like—by calling the difference a "surcharge" for using credit—because New York's no-surcharge law bars Expressions from using that word. Instead, Expressions is forced to describe the lower price as the "cash price" and the higher one as the "credit price," which Expressions believes is far less effective at conveying the costs of credit to its customers (and thus at reducing the amount Expressions pays in swipe fees) than having a "regular price" with a "surcharge" for credit. Indeed, Expressions knows from experience that customers who are presented with an extra charge for using a credit card are much more likely to respond by using a cheaper payment method.

5. Expressions is also concerned that even this less effective way of labeling its pricing could violate the no-surcharge law, depending on how Expressions' staff describe the price difference to customers. If even one staff member inadvertently refers to the difference as a "surcharge" for credit, or says that credit is "extra" or "more," Expressions is afraid that its truthful speech could subject the business to criminal sanctions. This fear is not merely hypothetical: New York has arrested and criminally prosecuted a gas station owner that maintained a similar dual-pricing policy solely because the gas station's cashier used the word "extra" to describe the price difference in a conversation with a customer. *See People v. Fulvio*, 517 N.Y.S.2d 1008 (Crim. Ct. N.Y. 1987). Expressions must therefore be exceedingly vigilant in instructing its staff on how to characterize the price difference, and in monitoring what they say to ensure compliance. Even then, Expressions is unsure what constitutes a surcharge and what constitutes a discount. "If a customer asks us whether

we charge more for paying with a credit card," wonders one of the salon's owners, "should we ignore or dodge the question? Are we required to answer falsely? Or should we say something like the following? 'State law does not allow us to tell you that you are paying more for using a credit card, but we can tell you that you are paying less for not using a credit card.'"

6. Plaintiff Linda Fiacco is one of three co-owners of Expressions Hair Design and is responsible for its day-to-day management.

7. Plaintiff The Brooklyn Farmacy & Soda Fountain, Inc. is an ice-cream parlor and soda fountain in Brooklyn, New York, founded in 2010. It is in a competitive industry with low profit margins, and swipe fees significantly cut into these margins. Brooklyn Farmacy pays an average of 2% to 3% per credit transaction in swipe fees and has paid thousands of dollars in fees since starting the business. Swipe fees are Brooklyn Farmacy's largest non-payroll-related expense besides rent. Although the company tries to reduce credit-card use by requiring a $10-minimum purchase amount to pay with credit, it currently does not have a dual-pricing system. This means that swipe fees get passed on to *all* of Brooklyn Farmacy's customers, cash and credit users alike, in the form of higher prices. And because these fees are kept hidden, customers who meet the minimum purchase amount have no disincentive to use credit—just the opposite, in fact, because of the benefits that most credit cards offer—which raises fees even higher.

8. The reason Brooklyn Farmacy does not offer dual pricing is because of the law's prohibition on speech and also because of its vagueness. As to the former: Brooklyn Farmacy would like to communicate the price difference as a "surcharge" for credit—not a "discount" for cash,

which would make prices look higher than they are—because the company believes that this would most effectively convey the costs of credit to its customers. New York's no-surcharge law blocks it from doing so. As to the latter: The law is so vague about what it prohibits that Brooklyn Farmacy is afraid to have any dual pricing at all, lest it accidentally subject itself to criminal prosecution. The company would have to instruct its employees on the difference between a "surcharge" and a "discount," which even its owners do not fully understand, and then constantly monitor the employees to make sure that each one is sticking to the script. Rather than risk criminal prosecution to say something that it believes is only marginally effective at communicating its message, Brooklyn Farmacy stays away from dual pricing altogether.

9. Plaintiff Peter Freeman is the co-founder of Brooklyn Farmacy and is responsible for its day-to-day management.

10. Plaintiff Bunda Starr Corp. owns Brite Buy Wine & Spirits, a liquor store in lower Manhattan founded in 1980. Brite Buy has accepted credit cards since the mid-1980s, when the New York State Liquor Authority changed its laws to allow liquor to be purchased with credit. Between 60% and 70% of Brite Buy's sales are now made with some form of payment card (usually a credit card), which means that the company incurs swipe fees for most of its sales transactions. Each year, Brite Buy pays tens of thousands of dollars in swipe fees. To cut down on these fees, the company had previously required a minimum purchase amount to pay with a credit card, but that strategy proved ineffective. Brite Buy would like to communicate the cost of credit to customers by calling it a "surcharge," which the company believes would be effective at getting them to

reduce credit use, but New York's no-surcharge law makes using that label a crime.

11. Because of New York's law, Brite Buy does not currently engage in dual pricing, even though it would like to (and even though that conduct is permitted). The company does not do so for the same reasons as Brooklyn Farmacy: (1) because the law imposes criminal punishment on the company's most effective way of conveying to its customers the true costs of credit, and (2) because the law's vagueness leaves the company uncertain as to whether it could implement a dual-pricing system in a lawful way.

12. Plaintiff Donna Pabst is president of Bunda Starr Corp. and is responsible for Brite Buy's day-to-day management.

13. Plaintiff Five Points Academy is a martial arts and fitness studio in lower Manhattan founded in 2003. It pays on average between 2.4% and 3.3% per credit transaction in swipe fees. Over the years, an increasing percentage of Five Points' members have chosen to pay their monthly dues and other expenses by credit card. This has caused a sharp increase in the amount the company pays each year in fees, to the point where it paid more than $50,000 in fees in 2012 alone. Five Points wants to offer a dual pricing system, but it will do so only if it can communicate the price difference as a "surcharge" for using credit (which the company believes is the best way to convey the costs of credit) and only if the law is clear about what it permits (and what it criminalizes). New York's no-surcharge law prevents both of these conditions from being satisfied.

14. Plaintiff Steve Milles is Vice President of Five Points Academy and is responsible for its day-to-day management.

15. Plaintiff Patio.com LLC is an outdoor furniture and billiards company founded in 1984. It has stores in Mount Kisco, Scarsdale, South Hampton, and Westbury, New York, as well as in six other states and online. Credit cards have become an increasingly popular payment method among Patio.com's customers. About 80% of the company's storefront sales are now made with a credit card. Patio.com pays on average between 2% and 3% per credit transaction in swipe fees. It paid more than $200,000 in swipe fees in 2012.

16. New York's no-surcharge law harms Patio.com in at least two ways. The law prevents the company from informing its customers of swipe fees by imposing a "surcharge" for credit, which it would like to do. And the law effectively prevents the company from having a dual-pricing system by (1) outlawing the most effective way of conveying that system and (2) being so unclear about how such a system can be lawfully described.

17. Plaintiff David Ross is the founder and president of Patio.com LLC, and is responsible for its day-to-day management.

18. Defendant Eric T. Schneiderman is the Attorney General of New York and is responsible for enforcing the laws of the state, including the state's no-surcharge law. Defendant Cyrus R. Vance, Jr. is the District Attorney of New York County and is responsible for representing the People of the State of New York in criminal proceedings in New York County. Defendant Charles J. Hynes is the District Attorney of Kings County and is responsible for representing the People of the State of New York in criminal proceedings in Kings County. Defendant Gerald F. Mollen is the District Attorney of Broome County and is responsible for representing the People of the State of New York in criminal proceedings

in Broome County. Each defendant is sued in his official capacity.

Factual Background

19. Americans pay some of the highest swipe fees in the world—seven or eight times those paid by Europeans, according to estimates by the Merchants Payments Coalition. The main reason swipe fees are so high is that they are kept hidden from consumers, who decide which payment method to use and thus determine whether a fee will be incurred in the first place. According to one survey, about 41% of American credit-card users are completely unaware that merchants are charged fees to process credit-card transactions. Although merchants are allowed to charge consumers more for using credit than for using cash, merchants cannot effectively communicate that added cost because New York and other states force them to call it a "discount" for cash rather than a "surcharge" for credit.

20. New York's no-surcharge law makes it a criminal offense—punishable by a fine of $500 and up to one year of imprisonment—for any "seller in any sales transaction [to] impose a surcharge on a holder who elects to use a credit card in lieu of payment by cash, check, or similar means." N.Y. Gen. Bus. Law § 518. New York's no-surcharge law does *not*, however, outlaw dual pricing. This is clear from (1) the state's own interpretation of the law, (2) the law's legislative history, (3) the only court decision to have addressed the question, and (4) federal law.

21. As the state itself has recognized, the no-surcharge law "'prohibits a vendor from charging a surcharge for credit card usage, but would not interfere with that same vendor establishing the higher price for credit card sales and then allowing a comparable discount for cash purchases.'" *Fulvio*, 517 N.Y.S.2d at

1011 (ellipsis omitted) (quoting prosecutor's memorandum). That is, "'[c]ash discounts are allowed, credit surcharges are impermissible.'" *Id.* at 1014. Moreover, the state has applied that distinction to cover speech uttered by employees, having prosecuted a gas-station owner because the station's cashier told a customer that using a credit card would cost "extra"—even though the station's pricing system was otherwise lawful. *Id.* at 1010.

22. The no-surcharge law's differential treatment of "surcharges" and "discounts" is also reflected in the law's legislative history, which makes clear that, under the law, a "merchant would be able to offer a discount for cash if they so desire." And the only court to address the line between "surcharges" and "discounts" interpreted the no-surcharge law as prohibiting the former but permitting the latter, in part because the purpose of the law was "to fill the gap created by expiration of the federal ban on surcharges" (which is discussed below), with the understanding that the federal "provision permitting a merchant to offer a discount for cash would still be permitted." *Id.* at 1012.

23. Until January 2013, New York's no-surcharge law was effectively redundant because credit-card companies imposed similar speech prohibitions in their contracts with merchants. But after federal antitrust litigation caused the two dominant credit-card companies (Visa and MasterCard) to change their contracts to remove their no-surcharge rules, New York's law took on added importance. It is now the only thing keeping the plaintiffs from saying what they would like: that they impose a "surcharge" for using credit because credit costs more.

I. Why labels matter: the communicative difference between "surcharges" and "discounts"

24. A "surcharge" on credit and a "discount" for cash "are different frames for presenting the same price information—a price difference between two things." Adam J. Levitin, *Priceless? The Economic Costs of Credit Card Merchant Restraints*, 55 UCLA L. Rev. 1321, 1351-52 (2008). They are identical in every way except one: the *label* that the merchant uses to communicate that price difference.

25. But labels can matter. "[T]he frame within which information is presented can significantly alter one's perception of that information, especially when one can perceive the information as a gain or a loss," as with the price difference between using cash and using credit. Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: Some Evidence Of Market Manipulation*, 112 Harv. L. Rev. 1420, 1441 (1999). This is largely because of a well-known cognitive phenomenon called "loss aversion," which refers to people's tendency to let "changes that make things worse (losses) loom larger than improvements or gains" of an equivalent amount. Daniel Kahneman, Jack L. Knetsch, & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. Econ. Persp. 193, 199 (1991). Put more simply: "people have stronger reactions to losses and penalties than to gains." Adam J. Levitin, *The Antitrust Super Bowl: America's Payment Systems, No-Surcharge Rules, and the Hidden Costs of Credit*, 3 Berkeley Bus. L.J. 265, 280 (2006).

26. Because of this, "[c]onsumers react very differently to surcharges and discounts," even though they present the exact same pricing information. *Id.* Consumers are more likely to respond to surcharges (which are perceived as *losses* for using credit) than to

discounts (which are perceived as *gains* for not using credit). *Id.* Research shows just how wide this gap is. In one study, 74% of consumers had a negative or strongly negative reaction to credit surcharges, while fewer than half had a negative or strongly negative reaction to cash discounts. That difference—the difference in how the same pricing information is understood by consumers—influences their behavior, making "surcharges" a much more effective way to communicate the costs of credit to consumers.

27. The effectiveness of surcharges is why the plaintiffs in this case seek to impose them: surcharges inform consumers of the costs of credit, letting consumers decide for themselves whether credit's benefits outweigh its costs. That exchange of information creates meaningful competition, which in turn drives down costs—as demonstrated by price-transparency reforms in Europe and Australia. If consumers are made aware of swipe fees and determine that they are too high, consumers will use a different payment method, and banks and credit-card companies will have to lower their fees to attract more business. Indeed, in Australia, where regulators in 2003 allowed complete transparency of price information and merchants have responded with surcharges, swipe fees have greatly declined.

28. But when the government criminalizes framing the added cost of credit as a "surcharge," as New York has done, merchants lose their most effective means of informing consumers of the high costs of credit. Moreover, because the dividing line between what constitutes a "surcharge" and what constitutes a "discount" is so blurry, many merchants (including many of the plaintiffs in this case) do not even attempt to offer dual pricing, even though the law allows it, to avoid accidentally subjecting themselves to criminal punishment. And many other merchants falsely believe

that they may not offer any dual pricing at all. The upshot, then, is that merchants end up passing on swipe fees to *all* consumers by raising the prices of goods and services across the board. This means that consumers are unaware of how much they pay for credit and have no incentive to reduce their credit-card use because they will pay the same price regardless. As a result, swipe fees have soared.

29. Swipe fees thus function as an invisible tax, channeling vast amounts of money from consumers to some of the nation's largest banks and credit-card companies. Because cash and credit purchasers both pay this tax, swipe fees are also highly regressive: low-income cash purchasers subsidize the cost of credit cards, while enjoying none of their benefits or convenience. According to Federal Reserve economists, "[b]y far, the bulk of [this subsidy] is enjoyed by high-income credit card buyers," who receive an average of $2,188 every year, paid disproportionately by poor and minority households.

30. For these reasons, numerous prominent economists and consumer advocates—from Joseph Stiglitz to Elizabeth Warren—have opined that no-surcharge policies are bad for consumers and hurt competition.

II. The credit-card industry's concerted efforts to prevent merchants from communicating the costs of credit as "surcharges"

31. The invisibility of swipe fees is no accident. It is the product of concerted efforts by the credit-card industry over many decades to ensure that merchants cannot communicate to consumers the added price they pay for using credit. Over the years, the industry has succeeded, both through contractual provisions and

legislative measures, to silence merchants' attempts to call consumers' attention to the true costs of credit.

The industry's early ban on differential pricing ends

32. In the early days of credit cards, any attempt at differential pricing between credit and non-credit transactions was strictly forbidden by rules imposed on merchants in their contracts with credit-card companies. That changed in 1974 after two important developments. *First*, Consumers Union sued American Express on the ground that its contractual ban on differential pricing was an illegal restraint on trade. Rather than face the prospect that federal courts would mandate full price transparency, American Express almost immediately settled the suit by agreeing to allow merchants to provide consumers with differential price information.

33. *Second*, Congress then enacted legislation protecting the right of merchants to have dual-pricing systems. Congress amended the Truth in Lending Act to provide that "a card issuer may not, by contract, or otherwise, prohibit any such seller from offering a discount to a cardholder to induce the cardholder to pay by cash, check, or similar means rather than use a credit card." Pub. L. No. 93, § 495, 88 Stat. 1500 (1974).

The credit-card industry shifts its strategy to labeling

34. The 1974 amendments were initially considered a victory for consumers. But the credit-card industry, seizing on Congress's use of the word "discount," soon shifted its focus to the way merchants could *label* and *describe* such pricing to consumers. Aware that how information is presented to consumers can have a huge impact on their behavior—and that many merchants would avoid dual pricing altogether if "surcharges" were outlawed—the credit-card lobby "insist[ed] that any

price difference between cash and credit purchases should be labeled a cash discount rather than a credit card surcharge." Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. Bus. S251, S261 (1986).

The credit-card industry's labeling strategy achieves short-lived success at the national level

35. In 1976, after two years of lobbying Congress to impose the credit-card industry's preferred speech code, the industry succeeded in getting Congress to enact a temporary ban on "surcharges," despite the authorization for "discounts." *See* Pub. L. No. 94–222, 90 Stat. 197 ("No seller in any sales transaction may impose a surcharge on a cardholder who elects to use a credit card in lieu of payment by cash, check, or similar means."). This controversial measure set the stage for a series of battles over renewal of the ban, culminating in an intense political debate in the mid-1980s that pitted both the Reagan Administration and consumer groups against the credit-card industry.

36. With the "surcharge" ban set to expire in 1981, the federal government and consumer advocates registered the impact that it had on consumers' and merchants' behavior. The Chairman of the Federal Trade Commission, writing in opposition to extending the law, recognized that the "surcharge" label drives home the true marginal cost of a credit transaction to the consumer. S. Rep. 97-23, at 11-12. Although "a discount and a surcharge are equivalent concepts," he remarked, "one is hidden in the cash price and the other is not," meaning that a ban on "surcharges" prohibited merchants from disclosing to their customers the true cost of credit. *Id.* at 10. Despite the opposition, Congress gave in to industry lobbying and renewed the law for an additional three years. Pub. L. 97–25, 95 Stat. 144 (1981).

37. In 1984, the no-surcharge law was again set to expire. Senator William Proxmire of Wisconsin, one of the ban's chief opponents, cut to the chase: "Not one single consumer group supports the proposal to continue the ban on surcharges," he observed. "The nation's giant credit card companies want to perpetuate the myth that credit is free." Irvin Molotsky, *Extension of Credit Surcharge Ban*, N.Y. Times, Feb. 29, 1984, at D12. The credit-card industry, acutely conscious of the threat that merchants' disclosure of credit's true cost posed to its business model, responded by unleashing a massive lobbying campaign to oppose ending the ban. Stephen Engelberg, *Credit Card Surcharge Ban Ends*, N.Y. Times, Feb. 27, 1984, at D1. One senior vice president of Shearson/American Express remarked in 1984 that his company had been opposing ending the ban for eight years. He observed that consumers do not write angry letters to credit-card companies about cash discounts, but do complain about surcharges. *Id.* He concluded that ending the ban "could potentially hurt the image of" credit cards, revealing that the industry viewed its legislative efforts as playing a key role in dictating the perception of credit cards among consumers. *Id.* The industry's efforts failed, and the ban lapsed in 1984. Levitin, *Priceless?*, 55 UCLA L. Rev. at 1381.

38. A 1981 report of the Senate Banking Committee, prepared as part of the law's initial renewal, stressed the law's role in regulating how a merchant could frame a dual-pricing system. The Committee observed that "while discounts for cash and surcharges on credit cards may be mathematically the same, their practical effect and the impact they may have on consumers is very different." S. Rep. 97-23, at 3. The no-surcharge law thus effectively set forth a speech code, requiring that merchants label their prices in the way that best hid the costs of credit and most enabled the credit-card

companies to take advantage of the framing effect: by advertising the credit price as the "regular" price, and the cash price as a "discount" from that price.

39. Furthermore, the vague distinction between "discounts" and "surcharges," and the risk of inadvertently describing a dual-pricing system in an unlawful way, led merchants to steer clear of such systems. In an editorial in *The New York Times*, Senator Christopher Dodd of Connecticut, a proponent of allowing surcharges, noted that "many merchants are not sure what the difference between a discount and a surcharge is and thus do not offer different cash and credit prices for fear they will violate the ban on surcharges." Sen. Christopher J. Dodd, *Credit Card Surcharges: Let the Gouger Beware*, N.Y. Times, Mar. 12, 1984, at A16. *See also* Carol Krucoff, *When Cash Pays Off*, Wash. Post, Sept. 22, 1981 (describing consumer activist who argued that merchants have not offered cash discounts because "the regulations have been so complicated. Smaller business people, who are most likely to offer them, may have been intimidated by the fear it could be viewed as an illegal surcharge."); Engelberg, *Credit Card Surcharge Ban Ends*, at D1 ("A House aide said that one explanation for the relative unpopularity of cash discounts is that retailers, aware that surcharges on credit purchases are illegal, have erroneously assumed that discounts are not permitted.").

The credit-card industry lobbies the states to enact no-surcharge laws and adopts contractual no-surcharge rules

40. After the controversial federal ban expired, the credit-card industry briefly turned to the states, convincing fewer than a dozen (including New York) to enact no-surcharge laws of their own. In an early instance of the phenomenon now known as

"astroturfing," American Express and Visa went to great lengths to create the illusion of grassroots support for such laws, even going so far as to create and bankroll a fake consumer group called "Consumers Against Penalty Surcharges." But real consumer groups—including Consumers Union and Consumer Federation of America—opposed state no-surcharge laws because they discouraged merchants from making the costs of credit transparent, which resulted in an enormous hidden tax paid by all consumers whenever they made a purchase.

41. New York's law took effect in June 1984, just after expiration of the temporary federal ban. N.Y. Gen. Bus. Law § 518. The law's legislative history does not hide the fact that it was intended to influence consumers' perceptions of credit cards by controlling the labels that merchants may use to describe mathematically equivalent transactions. For example, one state official justified the law as follows: "Surcharges, even if only psychologically, impose penalties on purchasers and may actually dampen retail sales. A cash discount, on the other hand, operates as an incentive and encourages desired behavior." Memorandum from Mollie Lampi, Associate Counsel, State Consumer Protection Board, to Gerald C. Crotty, Counsel to the Governor (June 1, 1984).

42. The only court to analyze the New York no-surcharge law concluded that, under the law, "precisely the same conduct by an individual may be treated either as a criminal offense or as lawfully permissible behavior depending only upon the *label* the individual affixes to his economic behavior, without substantive difference." *Fulvio*, 517 N.Y.S.2d at 1011 (emphasis in original). The court explained: "[W]hat General Business Law § 518 *permits* is a price differential, in that so long as that differential is characterized as a discount for payment by cash, it is legally permissible; what General Business

Law § 518 *prohibits* is a price differential, in that so long as that differential is characterized as an additional charge for payment by use of a credit card, it is legally impermissible. . . . General Business Law § 518 creates a distinction without a difference; it is not the *act* which is outlawed, but the *word* given that act." *Id.* at 1015 (emphasis in original).

43. Around the same time that New York's no-surcharge law was enacted, the major credit-card companies changed their contracts with merchants to include no-surcharge rules. No-surcharge laws in New York and other states thus function as a legislative extension of the restrictions that credit-card issuers imposed more overtly by contract. For instance, American Express's contracts with merchants include an elaborate speech code. The contracts provide that merchants may not "indicate or imply that they prefer, directly or indirectly, any Other Payment Products over our Card"; "try to dissuade Cardmembers from using the Card"; "criticize ... the Card or any of our services or programs"; or "try to persuade or prompt Cardmembers to use any Other Payment Products or any other method of payment (e.g., payment by check)."

The Durbin Amendment and the recent political controversy over swipe fees

44. From the mid-1980s until the 2000s the issue of swipe fees remained largely in the shadows. Even in the majority of states without anti-surcharge laws, the contractual no-surcharge rules ensured that consumers were rarely informed of the true costs of credit. Developments in the late 2000s, however, caused swipe fees to reemerge as a volatile political issue.

45. The global financial crisis of 2007-2008 and the ensuing push for financial-regulation reform resulted in renewed focus on swipe fees. Senator Dick Durbin of

Illinois proposed an amendment to the Senate version of the Dodd-Frank Wall Street Reform and Consumer Protection Act that aimed to reduce the fees associated with transactions by both debit and credit cards. Although proposed legislation to regulate *credit-card* swipe fees was defeated, the Durbin Amendment was enacted into law. As enacted, it establishes a procedure by which the Federal Reserve Board now sets the maximum swipe fees for *debit-card* transactions. 15 U.S.C. § 1693o-2(a). It also includes a provision protecting merchants' rights to offer consumers incentives for using different payment methods: "A payment card network shall not ... by contract, requirement, condition, penalty, or otherwise, inhibit the ability of any person to provide a discount or in-kind incentive for payment by the use of cash, checks, debit cards, or credit cards." *Id.* § 1693o-2(b)(2).

46. The fight over the Durbin Amendment shone a spotlight on the amount of revenue that banks generate from swipe fees, initiated a frenzy of lobbying by the credit-card industry, and touched off a contentious national political debate. Many merchants sought to convey their opposition to swipe fees directly to their customers—and voters—at the checkout counter. The national convenience store chain 7-Eleven, for example, put up signs asking customers to "STOP UNFAIR CREDIT CARD FEES" and gathered a total of 1.6 million signatures on a petition to support legislation on credit-card fees. 7-Eleven claimed that its petition represented the largest quantity of signatures ever presented to Congress—trumping even the 1.3 million signatures presented to Congress regarding national healthcare reform.

Visa & MasterCard drop their no-surcharge rules

47. In May 2005, Animal Land Inc., a pet-relocation company based in Atlanta, Georgia, sued Visa for a declaration that its no-surcharge rule violated antitrust laws by preventing Animal Land and other merchants from assessing a discrete, denominated charge upon customers using credit cards, as opposed to cash, checks, or debit cards. *Animal Land, Inc. v. Visa USA, Inc.*, No. 05-CV-1210 (N.D. Ga.). In the ensuing months, numerous U.S. merchants and trade associations brought claims against the dominant credit-card networks, alleging that they engaged in illegal price-fixing and impermissibly banned merchants from encouraging customers to use less expensive payment methods. The lead plaintiff in the lawsuit was Mitch Goldstone, the owner of a small photo-processing business. Troubled by consumers' ignorance about swipe fees and merchants' passive acceptance of them, Goldstone became an activist against the credit-card issuers, challenging their business practices in media interviews and blog postings in addition to his role as lead plaintiff in the lawsuit.

48. Under the terms of a national class-action settlement, Visa and MasterCard in January 2013 dropped their prohibitions against merchants imposing surcharges on credit-card transactions. As a result, state no-surcharge laws—previously redundant because of contractual no-surcharge rules—have now gained added importance. And as they did in the 1980s, credit-card companies are once again seeking to discourage dual pricing by pushing state legislation that dictates the labels that merchants can use for such systems.

Claims for Relief

Claim One: Violation of the First Amendment (under 42 U.S.C. § 1983)

49. New York's no-surcharge law regulates how the plaintiffs may characterize the price differences they may lawfully charge for credit and cash purchases. The law allows them to tell their customers that they are paying *less* for using cash or other means of payment (a "discount"), but not that they are paying *more* for using credit (a "surcharge"). This state-imposed speech code prevents the plaintiffs from effectively conveying to their customers—who absorb the costs of credit through higher prices for goods and services—that credit cards are a more expensive means of payment.

50. By prohibiting certain disfavored speech by merchants—and enforcing that prohibition with criminal penalties—New York's no-surcharge law violates the plaintiffs' First Amendment rights, as applied to the states through the Fourteenth Amendment. Because the no-surcharge law is a content- and speaker-based restriction on speech, it is subject to heightened scrutiny under the First Amendment. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011). Regardless of whether the law is analyzed under a special commercial speech inquiry, it cannot survive. The prohibited speech concerns lawful activity (engaging in dual pricing) and is not misleading; New York has no substantial interest in prohibiting the speech; and New York's no-surcharge law does not directly advance—and is far more extensive than necessary to serve—any interest the state might have. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980).

Claim Two: Void for vagueness (under 42 U.S.C. § 1983)

51. New York's no-surcharge law does not provide guidance about what speech is permitted and invites arbitrary and discriminatory enforcement. Because the law makes criminal liability turn on the blurry difference between two ways of describing the same conduct, the law does not provide a person of ordinary intelligence reasonable opportunity to know what is prohibited. Additionally, the law lacks explicit standards for those charged with its enforcement. It is therefore unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment.

Claim Three: Sherman Act preemption (under 42 U.S.C. § 1983)

52. New York's no-surcharge law allows credit-card companies to keep the costs of credit hidden from consumers by preventing merchants from communicating these costs in an effective manner. The prohibition on communication insulates credit-card companies from competition, causes the costs of credit to skyrocket, and frustrates the purposes of federal antitrust law—just as Visa and MasterCard's no-surcharge rules did. Because those rules constituted an antitrust violation, the no-surcharge law that now carries them out does so as well. *See Calif. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Hertz Corp. v. City of New York*, 1 F.3d 121 (2d Cir. 1993). The New York law violates, and is preempted by, the Sherman Act. 15 U.S.C. § 1 *et seq.*

Request for Relief

The plaintiffs request that the Court:

A. Declare that New York's no-surcharge law is unconstitutional and preempted by the Sherman Act, and enjoin its enforcement;

B. Award the plaintiffs their reasonable costs, expenses, and attorney's fees under 42 U.S.C. § 1988; and

C. Grant the plaintiffs all other appropriate relief.

July 15, 2013

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

DECLARATION OF STEPHEN MILLES

STEPHEN MILLES hereby declares:

1. I am the Vice President of Five Points Academy ("Five Points"), a martial arts school and fitness center located at 277 Canal Street in New York City. As the Vice President, I am responsible for the day-to-day management of Five Points, including setting up and maintaining Point of Sale software, repairing and maintaining the physical infrastructure of the facility, training and assigning instructors, determining the class schedule, teaching classes and individual sessions,

maintaining the facility website and social media pages and other assorted tasks.

2. Five Points has been operating a martial arts and fitness studio in the Canal Street and Broadway area for the past ten years. We offer beginning and advanced training in Muay Thai, Kali, and Judo, as well as more traditional strength and conditioning training.

3. Five Points has been accepting credit cards since its inception. Over the years, more and more of our members have used credit cards to pay their membership dues, as well as purchase classes, personal training sessions and the gym goods (e.g., water, Muay Thai equipment) that we sell. Currently, about 90% of Five Points' sales are on credit cards. When a member uses his or her crdit card, Five Points typically pays between 2.4% and 3.3% of the transaction total in merchand discout fees or "swipe fees". In contrast, if a member pays using a debit card, Five Points pays only 1.75% of the transation total in swipe fees. Obviously, Five Points pays no swipe fees if the member pays in cash or with a check. Last year alone Five Points paid over $50,000 in swipe fees; these fees represent our second largest non-staff related expense after rent and utilities.

4. Five Points' pricing has had to keep pace with the high cost of accepting credit cards. As it currently stands, Five Points must include the costs of accepting credit cards in the prices that we charge to all our members. By prohibiting us from charging different prices for cash and credit, and labeling that difference as a "surcharge," New York law in effect prohbits Five Points from informing consumers that we are passing along the cost of using credit directly to members who chose to pay with credit cards.

5. Five Points would like to impose a surcharge if a member pays with a credit card and to tell our members that there is no charge if they pay with a debit card, cash or a check. We believe that being able to impose a surcharge would fairly allocate the costs associated with credit card usage. Such a surcharge would also cause many of our members to switch their payment form to debit, cash or check, which are significantly cheaper for us. Switching members to cheaper payment forms and collecting a surcharge on credit card transactions for those members who choose to pay with a credit card would provide substantial cost savings to Five Points and would allow us to keep our prices down.

6. We have been informed that Five Points could tell members that we will give them a discount if they pay with cash, check or a debit card. While such a discount is, as a matter of mathematical calculation, the same as imposing a surcharge on credit card usage, it is not the same as a matter of business reality. People react very differently to a surcharge than to a discount. Five Points firmly believes that a surcharge will cause many members to switch payment forms and that a discount won't provide anywhere near the same motivation to switch, particularly for our members who like to earn rewards points on their credit cards.

7. There are also substantial difficulties in monitoring how our employees would express any such discount consistent with New York law, which, as best we can tell, would prohibit our employees from telling members that they will pay more if they use credit cards but would allow employees to tell members that they will pay less if they don't use credit cards. Neither I nor my partners are convinced that we understand this distinction completely, and we certainly do not have any confidence that our employees could or would observe that distinction in practice. Given that the New York no-

surcharge law imposes criminal penalties, we are certainly not willing to take that risk.

8. Nor are we willing to risk having a designated line item on our member invoices that informs members about the costs that credit card acceptance impose on Five Points being deemed a violation of New York law. While Five Points would like to add such a line item to monthly invoices to our members and show our members how much Five Points is paying in processing costs when they use a credit card, we are afraid that such a line item would be considered a "surcharge" under the New York law.

I declare under penalty of perjury the foregoing is true and correct.

Dated: New York, New York
May 22, 2013

s/ Stephen Milles
Stephen Milles

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

DECLARATION OF DONNA PABST

DONNA PABST hereby declares:

1. I am the President of Bunda Starr Corp, which owns Brite Buy Wine and Spirits ("Brite Buy") in Lower Manhattan. Brite Buy sells fine wines and spirits at a range of price points. I am responsible for the day-to-day management of Brite Buy, including choosing vendors, overseeing the store's financial accounting and bookkeeping, managing Brite Buy's employees and ordering the wine and spirits that are sold at the store.

2. Brite Buy opened in 1980 and has resided in Lower Manhattan for the past twenty three years. We began accepting credit cards in the mid-1980s when the New York State Liquor Authority first began to permit sales of liquor to customers using a credit card. Currently, between 60% and 70% of Brite Buy's sales are on some form of payment card. The merchant fees associated with accepting credit cards—fees that have consistently risen over the years—represent an enormous expense for Brite Buy. Each year, Brite Buy pays tens of thousands of dollars in merchant fees. And over the years, these fees have increased, not decreased. After rent, merchant fees are Brite Buy's single largest operating expense. These expenses cause Brite Buy to raise its prices.

3. Brite Buy has attempted a number of strategies to stem the tide of the ever rising merchant fees imposed by the credit card companies. For example, Brite Buy encouraged customers to pay with cash for smaller purchases for many years by imposing a minimum purchase requirement for credit cards.

4. The success of such strategies has been minimal given the lack of incentive to switch payment forms that such strategies provide and the desire of many of our customers to earn points with their credit cards. Brite Buy would instead like to use the proven tool of imposing a "surcharge" on customers who use credit cards. We believe that customers will react primarily in one of two ways when faced with a surcharge, both of which assist Brite Buy in lowering its operating expenses: First, many customers will react to a surcharge on credit card usage by switching their payment form from a credit card to cash, check or a debit card, each of which is substantially less expensive for Brite Buy. Alternatively, customers will continue to use their credit cards and pay the surcharge. Brite Buy understands that until

surcharging takes hold in the United States, some customers will also choose to not make a purchase and go to a different store. On balance, Brite Buy believes that the loss of business from those customers will be far outweighed by the savings that result from moving customers to a lower cost form of payment or recouping card processing expenses through the surcharge. These cost savings will allow Brite Buy to keep our prices down.

5. We also believe that imposing a surcharge on credit card usage is a more appropriate way to pass along the costs associated with credit card acceptance. Right now, Brite Buy must include the high costs of credit acceptance in its prices and cannot, consistent with New York law, transparently pass along those costs only to those customers who choose to pay with a credit card. We believe that it is unfair to force customers who use low cost payment forms to pay higher prices for the benefit of customers who choose to use their credit cards. A surcharge is the most effective way to end the de facto subsidy that flows from debit-paying and cash-paying customers to credit card-paying customers. Brite Buy understands that is allowed to in effect charge more to customers who pay with credit cards by labeling the difference as a "discount" for customers who pay with cash, check, or debt card. We also understand that such a "discount" is economically the same thing as a "surcharge," but those two labels produce very different customer interactions. Customers who want to pay with a credit card are much less likely to switch their method of payment when faced with a "discount" than they are when faced with a "surcharge." We want to inform our customers that they would be paying *more* when they use a credit card and calling the difference a "discount" will not effectively convey that message.

6. There is another real-world difficulty in implementing a discounting regime under New York's law: training and monitoring Brite Buy's employees. It is very difficult to explain to employees tasked with ringing up sales that the employee can tell a customer that he or she will pay less if they don't use credit cards but that the employee cannot tell that same customer that he or she will pay more if they use credit cards. Monitoring the day-to-day use of such a tortured verbal formulation would be next to impossible. Given the criminal penalties that New York's no-surcharge law carries, it would be too risky for Brite Buy to try to implement a discounting regime even if such a regime would be effective (which it would not).

I declare under penalty of perjury the foregoing is true and correct.

Dated: New York, New York

May 24, 2013

s/ Donna Pabst

Donna Pabst

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs,* v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant.*	No. 13-CIV-3775 (JSR)

DECLARATION OF PETER FREEMAN

PETER FREEMAN hereby declares:

1. I am the co-founder, along with my sister Gia Giasullo, of The Brooklyn Farmacy & Soda Fountain, Inc. ("Brooklyn Farmacy"), a cafe-style ice cream parlor and soda fountain in Carroll Gardens, Brooklyn. I am responsible for the day-to-day management of Brooklyn Farmacy, including training and managing our waitstaff, overseeing the financial accounting and bookkeeping for the business, and ordering and sourcing the ingredients that we use and retail items that we sell.

2. Brooklyn Farmacy was opened in 2010 after a year-long renovation of a 1920's pharmacy that had been derelict for many years. Brooklyn Farmacy considers itself a part of the Carroll Gardens community and seeks to cultivate a connection with its customers. As such, Brooklyn Farmacy routinely allows local organizations, such as the South Brooklyn Children's Garden and Local Roots CSA (community supported agriculture) to hold meetings in our back parlor. Brooklyn Farmacy has also made a commitment to locally source ingredients. For example, we buy fresh milk from Hudson Valley and strawberries from Long Island for our egg creams. In addition, we sell artisanal foods and goods from Brooklyn-based companies.

3. Brooklyn Farmacy has been accepting credit cards since its inception. While we considered accepting only cash, we determined that such an option was not viable for our retail business. About 40% of our sales are on credit cards. On average, we pay between 2% and 3% of the transaction total for sales involving credit cards. Since we started business in 2011, Brooklyn Farmacy has paid thousands of dollars in credit card merchant swipe fees.

4. Swipe fees are Brooklyn Farmacy's second largest non-payroll related operating expense after rent and utilities. To encourage customers to pay cash for smaller purchases, and because of the costs associated with accepting credit cards, we have a $10 minimum purchase requirement if a customer uses a credit card. When customers ask why we impose a minimum purchase—or why we don't accept American Express cards—we explain that it is because of the high fees that the credit card companies charge us when customers use their credit cards. For the most part, our customers have been supportive of our choice. They are often surprised to learn how much Brooklyn Farmacy is charged by the

credit card companies, particularly when contrasted to the high interest rate that many customers are charged when they carry a credit card balance.

5. When we first started the business, we were shocked at the high merchant fees that the credit card companies were charging. That shock quickly turned into outrage as we realized that small merchants such as Brooklyn Farmacy were powerless to fight back against these fees, which are set on take-it-or-leave-it basis. We want to do what we can to inform our customers about the high fees and encourage them to use cash instead of credit, and, ultimately, to encourage credit-card companies to lower the fees.

6. With the recent changes in Visa's and MasterCard's rules to permit merchants to impose a "surcharge" for credit-card transaction, merchants have a means of asserting some control over their credit card processing costs. Unfortunately, for merchants like Brooklyn Farmacy that are located in New York, the potent tool of surcharging is rendered meaningless by New York's no-surcharge law.

7. For multiple reasons, Brooklyn Farmacy would like to charge more for credit card transactions and label that price difference as a "surcharge" rather than a "discount." First, doing so would allow us to properly allocate the costs of credit card acceptance to those customers who use credit cards rather than including those costs in the prices that we charge all customers, as we do now. It is not fair to require our customers who pay with cash to pay higher prices for the benefit of those customers who pay with their credit cards. Second, surcharging credit card usage would allow Brooklyn Farmacy to effectively inform our customers about the costs that the credit card companies impose on merchants in a manner that will cause them to pay

attention. This is an important political and economic issue, and Brooklyn Farmacy wants to be able to use the strongest messaging possible with our customers and members of the community. Third, surcharging will allow Brooklyn Farmacy to lower its operating costs, which will allow us to keep our prices down.

8. We understand that Brooklyn Farmacy could legally charge customers more for using credit cards if we were to label the price difference as a "discount" for using cash or debit rather than a "surcharge" for using credit. That alternative, however, would be unacceptable for a variety of reasons. It would make our advertised prices look higher than they are, without making it transparent that the higher price would be due solely to credit card transaction costs—precisely the information we wish to convey to our consumers. Labeling the difference as a "discount" therefore, would not be nearly as effective as calling it a "surcharge." Even though they are mathematically the same thing, our customers would react very differently to a surcharge than to a discount, which is why these two labels—a 2% "surcharge" on the one hand and a 2% "discount" on the other—play out very differently in the real world. While we firmly believe that a "surcharge" would cause many customers to switch payment forms and/or allow Brooklyn Farmacy to recoup its processing costs, we do not believe that an equivalent "discount" would provide the same incentives. In addition, for our customers who are already inclined to pay with cash or a debit card, the discount is an unnecessary incentive and would be giving away money that otherwise could have been saved. In contrast, a surcharge on credit card usage targets the customers whose behavior we want to impact—customers who want to pay with a credit card.

9. There is another very practical obstacle to framing any price difference as a discount in New

York—namely, monitoring how our waitstaff would express such a "discount" in light of the state's no-surcharge law. We understand that the wait staff could legally tell customers that they will pay *less* if they don't use credit cards. But we are afraid that they would also (truthfully) tell our customers that they are effectively paying *more* by using a credit card, and that we would be in violation of the New York no-surcharge law if they did so. This distinction is difficult to understand and we do not feel that our waitstaff would be able to observe that distinction in practice. We are not willing to take the risk that we might be prosecuted by the state simply for conveying truthful information to our customers about the higher cost of using a credit card.

I declare under penalty of perjury the foregoing is true and correct.

Dated: Brooklyn, New York

May 25, 2013

s/ Peter Freeman

Peter Freeman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

DECLARATION OF DAVID ROSS

DAVID ROSS hereby declares:

1. I am the President of Patio.com LLC ("Patio.com"), a New York limited liability company. I am responsible for the day-to-day management of the company, as well as long term financial planning.

2. Patio.com is one of the largest, independently owned retailers of outdoor furniture and game room furnishings in the country. In addition to its online store, Patio.com has fourteen store locations across seven

states. In New York, Patio.com has stores in Mount Kisco, Scarsdale, Southampton and Westbury.

3. Patio.com's origins predate the dot-com era. The company, which is owned by myself and my two brothers, was founded in 1984. As a high school student, I started a swimming pool service company with $50. Business grew quickly, and when my brother Phillip joined me we became the first pool service company in Connecticut to open a retail location. Shortly thereafter, a second retail store was opened in Greenwich on a site of over an acre. As Patio.com's retail business grew, my oldest brother Mitchell joined the company as the director of purchasing and merchandising for outdoor furniture. Over the past ten years, Patio.com has opened new stores almost every year—including its first Florida store in 2010.

4. Patio.com has been accepting credit cards since its inception. Over the years, credit cards have become an increasingly popular form of payment at our storefront locations. Currently, about 80% of our storefront sales are on credit cards. Patio.com typically pays between 2% and 3% of the transaction total in merchant discount fees (commonly known as "swipe fees") when a customer uses a credit card to make a purchase. If a customer pays using a debit card Patio.com loses much less on the sale. For cash and check sales, Patio.com pays no merchant discount fee.

5. Last year Patio.com paid over $200,000 in credit card-related merchant discount fees. These fees represent a significant operating expense for Patio.com. It has been a point of enormous frustration for Patio.com that, unlike other areas of the business, we have not been able to realize any cost efficiencies with respect to credit card processing as our charge volume on credit cards has grown. In contrast to costs such as rent and advertising,

which have decreased in proportion to our sales as Patio.com has grown, we have not experienced any of the same efficiencies with merchant discount fees. Despite adding a new store virtually every year for the past ten years and continually growing our charge volume, the effective cost for Patios.com to accept credit cards has increased—not decreased—over time.

6. One of our goals at Patio.com is to guarantee our customers competitive, low prices for the outdoor furniture and game room furnishings that we sell. Patio.com, however, must include the costs of accepting credit cards in the prices that we charge to all customers because the New York no-surcharge law effectively prohibits us from passing along those costs only to those customers who pay with credit cards. This means that our customers who pay with cash, check or debit cards pay more for their purchases than they otherwise would if we could pass along the costs of credit card acceptance directly to those customers who actually use credit cards. We believe that it is unfair to force cash-paying and debit-paying customers to pay higher prices for the benefit of credit card users, and unfair for merchants to bear the hidden transaction costs.

7. In order to better inform our customers about the financial impact of merchant discount fees, Patio.com would like to add a line item to the receipt that illustrates the payment processing costs that Patio.com incurs when customers pay with credit cards. Such a line item would inform customers that they are paying more for using a credit card, but we are afraid that such a line item would also be considered a "surcharge" under the New York no-surcharge statute. Given the criminal penalties associated with the New York no-surcharge law, Patio.com has steered well clear of bumping up against the law.

8. At various times, Patio.com has attempted to encourage customers to use their debit cards through verbal steering. Our store and phone clerks try to list debit cards first when asked which forms of payment are accepted and there have been attempts to communicate the high costs associated with accepting credit cards. These attempts have had very limited positive results, however, as they do not provide customers with an incentive (other than perhaps altruism) to use their debit cards. Accordingly, Patio.com would like to charge customers more for paying with a credit card and to state that there is no charge for paying with debit, cash or checks. We believe that being able to charge a different price for credit card usage—and to call that price a "surcharge"—would provide a meaningful incentive to many customers to switch to paying with a debit card, cash or check. For those customers who continue to pay with a credit card, the "surcharge" would allow us to defray some of the costs of credit cards acceptance. Between switching customers to less expensive forms of payment and collecting a surcharge for those who pay with a credit card, we believe that Patio.com could realize substantial cost savings that would, in turn, allow us to keep our prices down.

9. We understand that Patio.com could in effect charge credit-card customers more by labeling the price difference between credit and a different payment method as a "discount" for paying with cash, check, or a debit card rather than a "surcharge" for paying with credit. We do not, however, believe that labeling this difference as a "discount" is as effective as calling it a "surcharge" for using a credit card, and we feel that such discounting would only be marginally more effective than the verbal steering that we already attempt with our customers. If the same transaction is communicated to the consumer as a "surcharge" rather than a

"discount," customers will react very differently. Even though the transaction is the same, consumers are much more likely to switch to less expensive payment forms when faced with a "surcharge" as opposed to a "discount."

10. In addition, we are concerned about the difficulty in controlling the language our employees would use to express a discount. We understand that employees may tell customers that they will pay *less* if they don't use credit cards but not that they will pay *more* if they use credit cards. This distinction is difficult to understand and we are not confident that we could ensure that our employees would be able to constantly adhere to that distinction in practice. We are not willing to take that risk, especially in light of the fact that New York's no-surcharge law imposes criminal penalties on merchants who make the mistake of telling consumers that they are paying more for using credit cards.

I declare under penalty of perjury the foregoing is true and correct.

Dated: Stamford, Connecticut

May 28, 2013

s/ David Ross

David Ross

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

DECLARATION OF LINDA FIACCO

LINDA FIACCO hereby declares:

1. I am one of the three co-owners of Expressions Hair Design ("Expressions"), a unisex hair salon in Vestal, New York. Along with my partners, I am responsible for the day-to-day operations of the salon, including scheduling appointments, handling finances, and providing the full range of services to our customers—including hairstyling, hair texturing, hair coloring, waxing, and massage.

2. Expressions accepts Visa, MasterCard, and Discover credit cards, and has been accepting credit cards since we started the business in 2006.

3. When a customer uses a credit card to pay for services, we typically pay between 2.4% and 3.3% of the price in swipe fees. By contrast, we pay only 1.75% in swipe fees if a customer pays using a debit card. And we pay no swipe fees at all if a customer pays with cash or a check. For a small business like ours, these swipe fees make an enormous difference.

4. Vestal is a college town—home to Binghamton University, the flagship campus of the State University of New York. But even in this university community, we have found that most of our consumers are not aware of the high cost of credit-card swipe fees or the ways in which they burden small businesses like ours. When they learn about swipe fees, however, our customers are generally sympathetic and tend to agree with our perspective.

5. We want to do what we can to ensure that our customers are aware of the high cost of using credit cards, and that they take that information into account in deciding how to pay for a haircut or other services. Ultimately, like most small merchants, we want credit card companies to reduce their swipe fees. We are aware that this issue is a matter of significant political controversy and has been debated in the state legislatures and in Congress (which recently considered regulating swipe fees). If we can do our part to educate people about swipe fees, we are hopeful that they will act on that information—both as consumers and as citizens.

6. Until 2012, Expressions posted a sign at our counter informing all customers that, due to the high swipe fees charged by the credit-card industry, we would charge them 3% more for using a credit card to purchase

services. But we took down the sign and stopped informing customers of that policy when a customer of ours (who is also a lawyer) told us that New York law makes it illegal to impose a "surcharge" on customers for paying with a credit card (even though merchants are allowed to provide a "discount" for paying with something other than a credit card).

7. Because of the New York no-surcharge law, our current policy is to charge two different prices for haircuts and other services—a lower price for customers paying in cash and a higher price for customers paying with a credit card. We try to be as careful as we can to avoid characterizing that price difference as a "surcharge" or an "extra" charge for paying with a credit card, even though it is obvious that customers do effectively pay more for using a credit card whenever a store offers a "discount" for using cash.

8. We would like to clearly and transparently impose a surcharge on customers who pay for their haircuts with credit cards, but the New York law prevents us from doing so. We believe that being able to describe the price difference as a "surcharge" would be the most effective way of communicating to our customers that they are paying *more* for using a credit card (not just that they are paying *less* for using cash). Even though these are just two ways of describing the same thing, people will respond differently. We know from experience that customers who are presented with a extra charge for using a credit card are much more likely to respond by using a cheaper payment method. We hope that giving merchants like us the ability to transparently impose surcharges will make consumers better informed about the costs of credit and, ultimately, cause those costs to go down across the board.

9. We are also very concerned about how we are supposed to ensure our compliance with New York's no-surcharge law. As far as we can tell, we are allowed to tell customers that they are paying *less* if they use cash but cannot tell customers that they are paying *more* for using a credit card—even though customers *are* actually paying more for using a credit card. That distinction is hard to understand, and even harder to follow in practice. If a customer asks us whether we charge more for paying with a credit card, should we ignore or dodge the question? Are we required to answer falsely? Or should we say something like the following? "State law does not allow us to tell you that you are paying more for using a credit card, but we can tell you that you are paying less for not using a credit card."

Dated: Vestal, New York
May 31, 2013

s/ Linda Fiacco
Linda Fiacco

Consumer Federation of California
P.O. Box 27066, Los Feliz Station,
Los Angeles, California 90027

July 5, 1985

Legislative Advocate
Harry Snyder
1535 Mission Street
San Francisco, Calif. 94103
(415) 431-6747

Senator Bill Lockyer
State Capitol
Sacramento, CA 95814

Re: Opposition to S.B. 848 (Rosenthal)

Dear Senator Lockyer:

The Consumer Federation of California representing 150 organizations millions of California consumers, urges you to oppose S.B. 848 (Rosenthal) when it is heard by the Senate Judiciary Committee on July 9th.

A federal law which prohibited retailers from charging for credit card use expired in January and efforts to renew it were unsuccessful. S.B. 848 (Rosenthal) would enact a similar prohibition into California law.

Retailers are charged a fee for credit card receipts. Yet S.B. 848 (Rosenthal) would make it impossible for a retailer to directly pass these costs on to credit card users. Instead, the bill would mandate the continuation of an invisible subsidy where cash customers must share the costs associated with credit card use through higher retail prices. This system is particularly inequitable for

low income consumers since most of do not have credit cards.

We urge you to oppose this bill to allow the marketplace to operate more effectively.

Sincerely,

Harry M. Snyder
Legislative Advocate
Consumer Federation of California

cc: Senator Herschel Rosenthal
Roger Dickinson
Mary Solow

Consumers Union

July 5, 1985

Senator Bill Lockyer
State Capitol
Sacramento, CA 95814

Re: Opposition to S.B. 848 (Rosenthal)

Dear Senator Lockyer:

Consumers Union, nonprofit publishers of Consumer Reports magazine urges you to oppose S.B. 848 (Rosenthal) when it is heard by the Senate Judiciary Committee on July 9th. This bill would prohibit retailers from charging a fee to their credit card customers.

Retailers pay a fee for all credit card purchases. (The fee is usually a percentage of volume sales. Fees for bankcards range from 2–5% while fees for private cards are generally higher with companies such as American Express charging as much as 6%.) However, this bill would prohibit retailers from passing this cost on to their credit card customers. It would continue an invisible subsidy in the marketplace whereby cash customers subsidize credit card customers through higher retail prices. This system is particularly inequitable to low income consumers since most of them do not have credit cards. (Less than 25% of those making $20,000 or less have a Visa or Mastercard; only 3.2% of this group has an American Express card.)

Until this year federal law prohibited retailers from charging a fee to their credit card customers. That federal law expired in 1984 and efforts to renew it failed. Now the credit card companies are trying to pass a

similar prohibition in the California legislature with S.B. 848 (Rosenthal).

We urge you to oppose this bill so that all consumers will not have to continue to subsidize those who chose to pay for their purchases with a credit card.

Sincerely,

Harry M. Snyder, Director
West Coast Regional Office
Consumers Union of the U.S., Inc.

cc: Senator Herschel Rosenthal

Chapter 160
Laws of 1984

Senate Bill 8367 Assembly Bill

SENATE – ASSEMBLY
March 14, 1984

IN SENATE – Introduced by Sens. LACK, CALANDRA, DALY, FLYNN, JOHNSON, KNORR, LAVALLE, LEVY, MARINO, SHERMERHORN, TRUNZO, TULLY, VOLKER – read twice and ordered printed, and when printed to be committed to the Committee on Consumer Protection

IN ASSEMBLY – Introduced by M. of A. GOLDSTEIN, WERTZ – read once and referred to the Committee on Consumer Affairs and Protection

AN ACT to amend the general business law, in relation to prohibiting the imposition of a surcharge on persons purchasing goods or services using a credit card

IN THE AS EMBLY BY: Goldstein, Wertz
A-10189

Bill compared by:

DATE RECEIVED BY GOVERNOR :
5/24
ACTION MUST BE TAKEN BY:
6/5
GOVERNOR'S ACTION:
DATE: 6/5/84

SENATE VOTE 52 Y 7 N

Date 5/8/84

ASSEMBLY VOTE 147 Y 0 N

Date 5/21/84

1984 SENATE JOURNAL
MAY 8 – 1984
PAGE 65

SENATE

The Senate Bill Senate No. 8367

by Mr. Lack Calendar No. 717 Assem. Rept. No.

Entitled:

8367 LACK

An act to amend the general business law, in relation to prohibiting the imposition of a surcharge on persons purchasing goods or services using a credit card

was read the third time

The President put the question whether the Senate would agree to the final passage of said bill, the same having been printed and upon the desks of the members in its final form at least three calendar legislative days, and it was decided in the affirmative, a majority of all the Senators elected voting in favor thereof and three-fifths being present, as follows:

AYE	Dist		NAY
	51	Mr. Anderson	
	48	Mr. Auer	
	17	*Mr. Babbush*	
	46	Mr. Barclay	
	20	*Mr. Bartosiewicz*	
	9	*Mrs. Berman*	
	33	*Mr. Bernstein*	

	29	*Mr. Bogues*	
	43	Mr. Bruno	
	34	Mr. Calandra	
	25	*Mr. Connor*	
	40	Mr. Cook	
	61	Mr. Daly	
	47	Mr. Donovan	
	6	Mr. Dunne	
	44	Mr. Farley	——
	60	Mr. Floss	——
	35	Mr. Flynn	
	31	*Mr. Galiber*	
	13	*Mr. Gold*	
	37	Mrs. Goodhue	
	26	Mr. Goodman	
	18	Mr. Halperin	
	22	*Ms. Jefferson*	
	10	*Mr. Jenkins*	——
	4	Mr. Johnson	
	53	Mr. Kehoe	——
	15	Mr. Knorr	
	2	Mr. Lack	
	1	Mr. LaValle	
	28	*Mr. Leichter*	EXCUSED
	8	Mr. Levy	
	49	Mr. Lombardi	
	24	Mr. Marchi	

	5	Mr. Marino	
	21	*Mr. Markowitz*	
	58	*Mr. Masiello*	
	30	*Mrs. Mendez*	
	23	*Mr. Montalto*	
	42	*Mr. Nolan*	
	27	*Mr. Ohrenstein*	
	14	*Mr. Onorato*	
	11	Mr. Padavan	
	54	*Mr. Perry*	——
	36	Mr. Pisani	EXCUSED
	56	Mr. Present	
	50	Mr. Riford	
	41	Mr. Rolison	
	32	*Mr. Ruiz*	
	39	Mr. Schermerhorn	
	52	Mr. Smith	
	19	*Mr. Solomon*	
	57	*Mr. Stachowski*	
	45	Mr. Stafford	
	12	*Mr. Stavisky*	
	55	Mr. Steinfeldt	
	3	Mr. Trunzo	
	7	Mr. Tully	
	59	Mr. Volker	
	16	*Mr. Weinstein*	
	38	*Mrs. Winikow*	

AYES 52
NAYS 7

Ordered, that the Secretary deliver said bill to the Assembly and request its concurrence therein.

S-8367

NEW YORK STATE ASSEMBLY A-10189

REPRINT NO: 001 DATE: 05/21/1984

DATE: 05/21/84 TIME: 03:37:07 P

BILL: S8367(A10189) R.R. NO. 195 SPONSOR:LACK

AN ACT TO AMEND THE GENERAL BUSINESS LAW, IN RELATION TO PROMIBITING THE IMPOSITION OF A SURCHARGE ON PERSONS PURCHASING GOODS OR SERVICES USING A CREDIT CARD

Y	ABRAMSON, E.
Y	BARBARO, FJ
Y	Barnett, HW
Y	Barraga, TF
Y	Becker, GR
Y	Behan, JL
Y	BENNETT, LE
Y	BIANCHI, IW
Y	BOYLAND, WF
Y	BRAGMAN, MJ
Y	BRODSKY, RL
Y	Burrows, GW
Y	Bush, WE
Y	BUTLER, DJ

Y	Casale, AJ
Y	CATAPANO, TF
Y	Chesbro, RT
Y	Cochrone, JC
Y	CONNELLY, EA
Y	CONNERS, RJ
Y	CONNOR, RJ
Y	Cooke, AT
Y	Coombe, RI
Y	DAmato, AP
Y	DAndrea, RA
Y	DANIELS, GL
Y	DAVIS, G
Y	DEARIE, JC
Y	DEL TORO, A
Y	DIAZ, HL
Y	DUANE, JF
Y	DUGAN, EC
Y	ENGEL, EL
Y	EVE, AO
Y	FARRELL, HD
Y	FELDMAN, D
Y	FERRIS, J
Y	Flanagan, JJ
Y	FREDA, L
Y	FRIEDMAN, G
Y	GANTT, DF

Y	GOLDSTEIN, R
Y	GORSKI, DT
Y	GOTTFRIED, RN
Y	GRABER, VJ
Y	GRANNIS, A
EOR	GREEN, RL
Y	GREENE, A
Y	GRIFFITH, E
Y	HALPIN, PG
Y	Hannon, K
Y	HARENBERG, PE
Y	Harris, GH
Y	HARRISON, J
Y	Hawley, RS
Y	Healey, PB
Y	HEVESI, AG
Y	HIKIND, D
Y	HINCHEY, MD
Y	Hoblock, MJ
ABS	HOCHBRUECKNER, GJ
Y	HOYT, WB
Y	JACOBS, RS
Y	JENKINS, C
Y	KEANE, RJ
Y	Kelleher, NW
Y	KOPPELL, GO
Y	KREMER, AJ

Y	Kuhl, JR
Y	LAFAYETTE, IC
Y	Lane, CD
Y	Larkin, WJ
Y	LASHER, WL
Y	Leibell, VL
Y	LENTOL, JR
Y	Levy, E
Y	LIPSCHUTZ, GE
Y	MacNeil, HS
Y	Madison, GH
Y	MARCHISELLI, VA
Y	MARSHALL, HM
Y	MAYERSOHN, N
Y	MCCABE, JW
Y	McCann, JW
Y	MCNULTY, MR
Y	MCPHILLIPS, MM
Y	Miller, HM
Y	MILLER, MH
Y	MUPRHY, MJ
Y	MURTAUGH, JB
Y	NADLER, J
Y	Nagle, JF
Y	NEWBURGER, MW
Y	NORMAN, C
Y	Nortz, HR

Y	Nozzolio, MF
Y	ONeil, JG
Y	ORAZIO, AF
Y	PARMENT, WL
Y	Parola, FE
Y	PASSANANTE, WF
Y	PATTOn, BA
Y	Paxon, LW
Y	Parone, JM
Y	Pillittere, JT
Y	PORDUM, FJ
Y	PROUD, G
Y	Rappleyea, CD
Y	Rettaliata, AP
Y	RIVERA, J
Y	ROBACH, RJ
Y	ROBLES, VL
Y	RUGGIERO, RS
Y	Ryan, AW
Y	RYAN, WJ
Y	Saland, SM
Y	SANDERS, S
Y	Sawicki, J
Y	SCHIMMINGER, RL
Y	SCHMIDT, FD
Y	Sears, WR
Y	SEMINERIO, AS

Y	SERRANO, JE
Y	Sheffer, JB
Y	SIEGEL, MA
Y	SILVER, S
Y	SLAUGHTER, LM
Y	Spano, NA
Y	Straniere, RA
Y	SULLIVAN, EC
Y	Sullivan, PM
Y	TALLON, JR
Y	Talomie, FG
Y	Tedisco, J
Y	TONKO, PD
Y	VANN, A
Y	VITALIANO, EN
Y	WALDON, AR
Y	WALSH, DB
Y	Warren, GE
Y	WEINSTEN, WE
Y	WEPRIN, S
Y	Wertz, RC
Y	Wesley, RC
Y	WILSON, CE
Y	Winner, GH
Y	YEVOLI, LJ
Y	YOUNG, GP
Y	ZIMMER, MN

MR. SPEAKER

YEAS: 147 NAYS: 0

ONTROL: 20638082 CERTIFICATION:_____

LEGEND: Y=YES, NAY=NO, NV=ABSTAIN,
ABS=ABSENT,

ELB=EXCUSED FOR LEGISLATIVE BUSINESS,
EOR=EXCUSED FOR OTHER REASONS.

MEMORANDUM

Senate Bill — Introduced by Senator James J. Lack

Assembly Bill 10189 — Introduced by Assy. Ralph Goldstein

AN ACT to amend the general business law, in relation to prohibiting the imposition of a surcharge on persons purchasing goods or services using a credit card

SUMMARY:

This bill would enjoin any merchant from levying a surcharge on sales or services charged to a credit card.

The bill would provide that any merchant who breaches the provisions of this bill would be guilty of a misdemeanor, liable for a fine of not more than $500, or one year in prison, or both.

A merchant would be able to offer a discount for cash if they so desire. The only procedure that would be prohibited is a surcharge for credit in keeping with the provisions of the Federal ban that recently expired.

JUSTIFICATION:

The expiration of a Federal ban on surcharges on credit card purchases places credit card users at an unfair disadvantage. While merchants are permitted to offer cash discounts, they would attempt to offset the 3% fee charged (to them) by banks or card corporations for

credit services by increasing the price of a good or service purchased on a credit card.

In effect, two price scales would exist for the merchant who would advertise a certain price and, at the time of the sale, raise or lower the price according to the method of payment. Consequently, the consumer would be subject to dubious marketing practices and variable purchase prices.

FISCAL IMPLICATIONS:

None

EFFECTIVE DATE:

Immediately upon enactment

717

MEMORANDUM

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Assembly Bill — Introduced by Assy. Ralph Goldstein

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In effect, two price scales would exist for the merchant who would advertise a certain price and, at the time of the sale, raise or lower the price according to the method of payment. Consequently, the consumer would be subject to dubious marketing practices and variable purchase prices.

FISCAL IMPLICATIONS:

None

EFFECTIVE DATE:

Immediately upon enactment

THE SENATE
STATE OF NEW YORK
ALBANY 12247

May 29, 1984

TO: The Hon. Gerald C. Crotty
FROM: Senator James J. Lack
RE: Senate Bill 8367

Thank you for giving me the opportunity to write to you in favor of the above bill which would amend the General Business Law by adding a new section which would prohibit merchants and vendors from adding a "surcharge" to purchases made with a credit card.

Until February 28, of this year, there was in place by Federal law, a restriction on merchants and other commercial vendors from imposing any surcharge on consumers who paid for goods or services by way of a credit card, in lieu of payments by cash, check or similar direct remittance. This Federal legislation has lapsed and it does not appear imminent that the separate houses of Congress will be able to agree upon a unified resolution of the "surcharge" ban that has been in place for so many years.

The consumers of New York State must not be required to forego this essential protection in the market place because Congress cannot agree on whether the ban should be permanent or temporary, or otherwise resolve the somewhat technical points which appear to be hindering the passage of this worthwhile protection for the entire nation.

I urge the Governor, on behalf of all of the consumers of New York State, to sign the proposed legislation into law. A very successful and balanaced effort has been pursued in New York to protect the rights of consumers and yet allow the merchants and commerical enterprises

in New York State to prosper with a minimum of direct government regulation. This bill would continue that careful balance.

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

May 30, 1984

Hon. Gerald C. Crotty
Executive Chamber
State Capitol
Albany, NY 12224

Dear Mr. Crotty

The attached legislation (A.10189, S.8367) prohibits sellers from placing any surcharge on a consumer who pays by credit card rather than cash or check. A "surcharge" here is understood to mean any means of increasing the regular price to a cardholder which is not imposed upon customers paying by cash, check or a similar means. This is identical to the definition contained in § 103 (q) of the federal Truth-in-Lending Act.

Since the February 27th expiration of the federal ban on such surcharges, five states have acted to continue to prohibit credit surcharges, and Connecticut and Pennsylvania are expected to soon follow. It is important that New York do so as well. Credit cards are a way of life in our country; New Yorkers have become accustomed to their use, and to allow imposition of a surcharge now will only result in a windfall for some retailers with no concomittant benefit for consumers.

It is important to note that this bill does nothing to prevent a seller from offering a discount to consumers who pay by cash or check. This was always permitted under truth-in-lending and continues to be allowed under the proposed bill.

I urge you to recommend that the Governor approve this legislation.

Sincerely yours,

RALPH GOLDSTEIN
Member of Assembly

Memorandum

New York State Police

June 6, 1984

SENATE	ASSEMBLY	INTRODUCED BY
8367		Sens. Lack, Calandra, Daly, Flynn, Johnson, Knorr, Lavalle, Levy, Marino, Schermerhorn, Trunzo, Tully, Volker

RECOMMENDATION: APPROVAL

STATUTE INVOLVED: GENERAL BUSINESS LAW

EFFECTIVE DATE: IMMEDIATELY

PURPOSE:

This bill amends the General Business Law by adding a new Section 518. This section would prohibit sellers in any sales transaction from imposing a surcharge for the use of a credit card. Violation of this provision is a misdemeanor and subjects violators to a fine not to exceed $500.00 and/or a term of imprisonment not to exceed one year. The Division of State Police recommends approval of this legislation.

Donald O. Chesworth
Superintendent

cc: Lawrence T. Kurlander
Director of Criminal Justice
Executive Chamber
State Capitol
Albany, NY 12224

Memorandum

June 1, 1984

To: Gerald C. Crotty
Counsel to Governor

From: Mollie Lampi, Associate Counsel
State Consumer Protection Board

Re: S.8367 (Lack)/A.10189 (Goldstein)

__X__ The Consumer Protection Board supports this bill.
_____ The Consumer Protection Board has no position on this bill.
_____ The Consumer Protection Board opposes this bill.

Comments:

The Consumer Protection Board supports S.8367/A.10189 to permanently ban credit card surcharges. Credit card surcharges were illegal until very recently when the federal prohibition on their use expired. As of this date, no new federal ban has been enacted. Merchants, however, may continue to offer discounts to those customers purchasing in cash.

Surcharges, even if only psychologically, impose penalties on purchasers and may actually dampen retail sales. A cash discount, on the other hand, operates as an incentive and encourages desired behavior.

One of the most important efforts of the consumer movement has been to insure that customers can depend on advertised claims and prices. Allowing credit card surcharges may defeat this effort however, by permitting unannounced price increases at the point of sale.

For these reasons, the Consumer Protection Board recommends approval of this bill.

MEMORANDUM

May 25, 1984

STATE OF NEW YORK
DIVISION OF CRIMINAL JUSTICE SERVICES

TO: Matthew Crosson
FROM: Jay M. Cohen
SUBJECT: A. 2611, A. 5314C, A. 8029 & A. 10189/S. 8367

We have no comments on the subject bills.

js

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
ALBANY, NEW YORK
12236

EDWARD V. REGAN
STATE COMPTROLLER

May 23, 1984

The Honorable Gerald C. Crotty
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Dear Mr. Crotty:

Thank you for requesting our comments regarding the bills listed below. Since these bills are not within an area of direct responsibility or interest of the Office of the State Comptroller we will offer no opinion in relation to their enactment.

	Senate	Assembly
	6705-C	4525-A
	7417	10310
	8193-A	
X	8367	
	8398	
	8531	

Very truly Yours,
John F. Black
Assistant Counsel

STATE OF NEW YORK
DEPARTMENT OF COMMERCE
ONE COMMERCE PLAZA
ALBANY, NEW YORK 12245

TEN-DAY BILL MEMORANDUM
June 4, 1984

TO: Gerald C. Crotty
Counsel to the Governor

FROM: Thea Hoeth, First Assistant Counsel
Department of Commerce

SUBJECT: S. 8367 (Lack, et al.)

RECOMMENDATION: No Objection

The Department of Commerce has no objection to this bill, which would amend the General Business Law to prohibit sellers from imposing a surcharge on sales charged to a credit card. Violations would be punishable by a fine of $500 and/or one year in prison.

This bill was proposed to maintain the status quo while extension of the Federal surcharge ban, which expired in February, is debated by Congress. In the absence of State or Federal action, merchants may increase the cost of goods paid for by credit card although the Department suspects the pressures of the marketplace would discourage such practice. Finally, the Department understands that the Retail Council of New York State is not opposing the measure.

T.H.

TO COUNSEL TO THE GOVERNOR

RE: SENATE 8367
ASSEMBLY

Inasmuch as this bill does not appear to relate to the functions of the Department of Law, I am not commenting thereon, at this time. However, if there is a particular aspect of the bill upon which you wish comment, please advise me.

ROBERT ABRAMS
Attorney General

Dated: 5-24-84

NYCOM

May 23, 1984

Hon. Gerald C. Crotty, Counsel
Executive Chamber
State Capitol
Albany, NY 12224

R: S. 8367

Dear Mr. Crotty:

The Conference of Mayors writes this memorandum at your request. We wish to advise the Governor that we do not believe that the subject matter of this bill relates to the operation of local government. Hence, we will make no recommendation relating to this bill.

Sincerely,

DONALD A. WALSH
General Counsel

New York State Conference of Mayors and Other Municipal Officials

RETAIL COUNCIL OF NEW YORK STATE

May 25, 1984

MEMORANDUM

S. 8367 (Lack et al.) – Senate Consumer Protection Committee

A. 10189 (Goldstein, Wertz) – Assembly Consumer Affairs and Protection Committee

AN ACT to amend the general business law, in relation to prohibiting the imposition of a surcharge on persons purchasing goods or services using a credit card.

This bill would prohibit any merchant from imposing a surcharge on sales or services charged to a credit card, regardless of the cost the merchant must absorb to process that credit transaction.

A merchant must pay a percentage of each credit sale to the credit card company, and, as a rule, this business expense is recovered through the retail price on all merchandise for sale. In essence, cash customers and those who cannot qualify for credit cards are subsidizing credit customers since everyone must pay more to cover the inherent costs of processing credit transactions. Without the option of imposing a surcharge on credit purchases, a merchant has no choice but to raise the price of all goods accordingly, or face the prospect of going out of business.

We feel if merchants are allowed to recover their credit costs directly through a surcharge, the level of competition between retailers could be heightened,

resulting in a variety of new credit terms and options for discriminating shoppers. If a surcharge on credit sales is authorized, some merchants would then have the latitude to consider such attractive consumer options as lower interest rates on proprietary (store) credit cards, or reduced retail prices on all goods.

Federal legislation to authorize surcharges on credit card purchases is being supported by the Consumer Federation of America, Consumers Union, Federal Reserve Board and the Federal Trade Commission. The Retail Council adds its support, emphasizing that this issue should be resolved on the federal, not the state, level.

Respectfully submitted,

James A. Quaremba, President and
Chief Executive Officer

Peter H. Zimmerman, Vice President
and Director of Governmental Affairs

New York State Association of Counties
150 STATE STREET ALBANY, NEW YORK 12207

May 29, 1984

Honorable Gerald Crotty
Counsel to the Governor
The Executive Chamber
The Capitol
Albany, NY 12224

RE: S. 8367/A/10189

Dear Gerry:

This letter is in response to your recent inquiry concerning the above-mentioned legislation recently passed both houses of the Legislature and now before the Governor for executive action.

The New York State Association of Counties has no position on this legislation.

Please call on our office if we can be of any further assistance.

Yours very truly,

Edwin L. Crawford
Executive Director

Attorney General Cuomo's Investigation Prompts 14 Suffolk County-based Home Heating Oil/propane Companies To Agree To Stop Charging Surcharges For Credit Card Purchases

HAUPPAUGE, N.Y. (September 14, 2009) -Attorney General Andrew M. Cuomo today announced that his office has reached settlements with 14 Suffolk County-based home heating oil companies for improperly adding surcharges for credit card payments.

The agreements with Avalon Fuel Corporation, Ben Oil Company, Inc., Blue Collar Fuel, Inc., Comfort Fuel, Inc., Discount Oil, Inc., K Skee Fuel Oil Corp., NAPCO Oil Heat Corporation, Nordica Fuel Corp., Oil King of Long Island, Parkside Fuel, Inc., Pazienza Bay Carting and Fuel Company, Inc., Rocky & Marciano Fuel Oil, Inc., Southville Petroleum Corporation and Taylor Fuel, Inc. end the practice of adding surcharges for credit card payments and provide refunds to more than 2,000 affected consumers and pay penalties and costs to the state.

"As winter approaches, families across the state start looking for the best and most affordable way to keep their homes warm," said Attorney General Cuomo. "This already massive expense should not be compounded by hidden costs and charges that place an even greater burden on New York homeowners. Today's agreement will provide welcome relief to thousands of Long Islanders who suffered from these companies' misleading and deceptive business practices."

Under New York State General Business Law section 518, no seller may impose a surcharge for customers who elect to pay via credit card in lieu of payment by cash, check or similar means. After receiving complaints from local consumers, the Attorney General's Office conducted an immediate investigation

into Suffolk County-based companies that were routinely charging illegal surcharges. As part of the agreements, the companies have agreed to immediately stop charging such fees:

- Manorville-based Avalon Fuel Corporation must provide refunds to an estimated 200 customers and pay $4,000 in penalties, fees and costs to the state.
- Lindenhurst-based Ben Oil Company, Inc., must provide refunds to approximately 40 of its credit card-using customers.
- Shoreham-based Blue Collar Fuel, Inc. must pay refunds to 600 customers.
- Greenlawn-based Comfort Fuel, Inc. must pay refunds to 30 customers.
- Huntington-based Discount Oil, Inc. must provide refunds to 50 customers.
- Centereach-based K Skee Fuel Oil Corp. must refund 150 customers and pay a $1,000 fine to the state.
- Lindenhurst-based NAPCO Oil Heat Corporation must provide refunds to 200 customers and pay $3,000 in penalties, fees and costs to the state.
- Ronkonkoma-based Nordica Fuel Corp. must pay refunds to 70 customers.
- Oil King of Long Island, based in Bay Shore, must pay refunds to 40 customers.
- Parkside Fuel, Inc., of Mount Sinai, must provide refunds to 50 customers.
- Holtsville-based Pazienza Bay Carting and Fuel Company, Inc., must give refunds to 150 customers and pay $1,000 in penalties, fees and costs to the state.
- Holtsville-based Rocky & Marciano Fuel Oil, Inc. must provide refunds to 400 customers and pay $4,000 in penalties, fees and costs to the state.

- East Northport-based Southville Petroleum Corporation must pay refunds to 55 customers, plus $1,000 in penalties, fees and costs to the state.
- Ronkonkoma-based Taylor Fuel Company must pay refunds to approximately 20 customers.

Consumers who believe they have been subjected to fraud or deceptive practices are urged to contact the Attorney General's Suffolk Regional Office at 631-231-2401. More information can be found online at www.ag.ny.gov.

The cases were handled by Acting Assistant Attorney General-in-Charge of the Suffolk Regional Office Alan Berkowitz.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

SUPPLEMENTAL DECLARATION OF STEPHEN MILLES

STEPHEN MILLES hereby declares:

As I explained in my previous declaration, Five Points Academy would like to impose an extra charge, or "surcharge," if a member pays by credit card instead of cash, check, or debit card. We would display prominently the surcharge that the customer will incur for using a credit card. It is not our intention to display two separate prices for each good and service that we offer, but rather

to display—with roughly equal prominence—a single set of prices and the credit card surcharge amount.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at New York, New York on July 28, 2013

s/ Stephen Milles

Stephen Milles

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

SUPPLEMENTAL DECLARATION OF LINDA FIACCO

I, Linda Fiacco, hereby declare:

As I explained in my previous declaration, Expressions Hair Design used to post a sign prominently informing all of our customers that, due to the high swipe fees charged by the credit-card industry, we would charge them 3% more for using a credit card. But we were forced to take down the sign in 2012 when we learned of New York's no-surcharge law. To be perfectly clear: We would like to be able to put our sign

back up and, as we did before, characterize the price difference as a 3% credit-card surcharge on top of the listed cash price. As before, our sign would list with equal prominence both the cash price and the additional credit-card charge—expressed as a percentage—without also displaying the total credit-card price as a dollar figure. The only reason we have not put our sign back up is that we are afraid we would be found in violation of New York's no-surcharge law.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Vestal, New York
July 26, 2013

s/ Linda Fiacco
Linda Fiacco

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

DECLARATION OF MICHAEL PARISI

Michael Parisi declares as follows:

1. I am the owner of Parkside Fuel Oil Delivery & Service, a family-owned-and-operated heating-and-cooling company in Mount Sinai, New York. I am responsible for Parkside's day-to-day operations, which include the sale, installation, and servicing of home boilers, oil tanks, water heaters, and air-conditioning units.

2. Parkside has been in business since 2001 and has steadily grown through excellent service and customer

loyalty. We pride ourselves on providing prompt deliveries and expert service, and the satisfaction of our customers has been our primary goal since day one.

3. Parkside allows customers to pay with a credit card. When a customer uses a credit card to make a purchase, we pay between 2% and 3% of the price in swipe fees. For a small business like ours, these fees make an enormous difference.

4. Several years ago, we decided to start imposing a small surcharge on credit-card purchases to help recover some of the cost of accepting credit cards. We did this because we did not want to raise our prices to make all customers pay these costs, which we thought was unfair to those who paid in cash.

5. We notified our customers of this surcharge on the phone, at the same time that we informed them of our prices, before they made a purchase. We would tell them the price of fuel (for example, $3.45/gallon) and then explain that there was a surcharge on top of that price for paying with a credit card (for example, $.05/gallon). Every customer who paid a surcharge was therefore made aware of the charge before doing so, meaning that each one could have made a decision to use cash to avoid paying the charge.

6. In 2009, the New York Attorney General's Office called our business pretending to be a customer ordering oil. We quoted the price of oil and said that we charge a fee on top of that price for using a credit card. The Attorney General took the position that we were imposing a credit-card "surcharge" in violation of General Business Law § 518.

7. Because we did not want any trouble, and because we are not lawyers and have no legal training, we did not contest the charges, and instead complied with the Attorney General's demand that we stop imposing

surcharges on credit-card purchases and also provide credits to customers who had paid surcharges from September 2008 to May 2009. The Assurance of Discontinuance that I signed is attached to this declaration.

8. In a telephone conversation with a lawyer named Alan Berkowitz from the Attorney General's Office, I asked how I could lawfully pass on the cost of credit to customers under the No-Surcharge Law. He told me that I could do so by characterizing the difference between paying with cash and paying with credit as a cash "discount," not a credit "surcharge," and then gave me a script of what I could tell customers when talking to them over the phone. He said that I could quote the price as $3.50/gallon, for example, and then explain to customers that they would receive a $.05/gallon "discount" for paying with cash, but that I could not quote the price as $3.45/gallon while explaining that they would have to pay a $.05/gallon "surcharge" to use a credit card.

9. For a little while, we tried doing what he had said. We offered "discounts" to those who paid in cash. But our customers found that to be very confusing, and it made us look unscrupulous because Suffolk County charges a sales tax of 2.5% on home heating fuel (which is similar to the amount of the cash discount that we offered), and some customers mistakenly thought that we would not pay the tax if they paid in cash, which is not the message that we meant to convey. As a result, we stopped offering discounts and now charge only one price to all of our customers regardless of whether they use cash or credit.

10. We have been told that the Attorney General is now claiming that the state's No-Surcharge Law is just a false-advertising law. That does not square with our

experience. The Attorney General's Office never told us that we could impose a surcharge on our credit-card-paying customers if only we disclosed the charge to them ahead of time. In fact, the Assurance of Discontinuance clearly says that we "shall not charge consumers a surcharge for payment by credit card," period, regardless of how it is disclosed.

11. Based on our experience, New York's No-Surcharge Law is all about semantics. The Attorney General always told us that we could not say that we charge more for using a credit card, but that we could say that we charge less for using cash. We were targeted because we didn't realize that we had to tell our customers about the price difference between cash and credit in a specific way.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Mount Sinai, New York
July 23, 2013

s/ Michael Parisi
Michael Parisi

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

June 29, 2009

Parkside Fuel, Inc.
1054 Route 25A
Mt. Sinai, New York 11766

To Whom It May Concern:

Attached please find the Assurance of Discontinuance that you have entered into with the Attorney General.

Very truly yours,

ALAN B. BERKOWITZ
Assistant Attorney General

ABB/lm

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

----------X

In the Matter of AOD# 09-105
PARKSIDE FUEL, INC.

----------X

ASSURANCE OF DISCONTINUANCE PURSUANT TO EXECUTIVE LAW § 63(15)

Pursuant to the provisions of Article 22-A of the General Business Law and §63(12) of the Executive Law, ANDREW M. CUOMO, Attorney General of the State of New York caused an inquiry to be made into the business practices of PARKSIDE FUEL, INC. ("PARKSIDE"), and based upon that inquiry makes the following findings:

FINDINGS

1. PARKSIDE is a New York corporation located at 1054 Route 25A, Mt. Sinai, NY, 11766. PARKSIDE is engaged in the business of providing home heating oil and services in the State of New York.

2. PARKSIDE has been providing home heating oil and services for a number of years.

3. In conducting its home heating business, PARKSIDE uses various types of contracts. The Attorney General's inquiry relates to the home heating oil delivery for the 2008-2009 season. In setting its price for fuel oil, PARKSIDE regularly imposed a surcharge on consumers who chose to use a credit card as opposed to paying by cash or check.

4. Under General Business Law §518, no seller in any sales transaction may impose a surcharge on a purchaser who elects to use a credit card in lieu of payment by cash, check, or similar means. An

investigation by the Office of the Attorney General reveals that consumers were regularly and routinely charged these illegal surcharges by PARKSIDE.

5. By reason of the foregoing, the Attorney General asserts that PARKSIDE has engaged in conduct which violates General Business Law §518.

ASSURANCE

6. IT NOW APPEARS that PARKSIDE desires to settle and resolve the investigation. Accordingly, the Attorney General and PARKSIDE hereby enter into this Assurance of Discontinuance.

7. IT IS HEREBY UNDERSTOOD AND AGREED by PARKSIDE, its officers, directors, agents, employees and assignees, and any individual or entity through which PARKSIDE may now or hereafter act, as follows:

8. PARKSIDE shall not enforce provisions of any contract or any contract that includes a credit card surcharge in violation of General Business Law §518. Furthermore, PARKSIDE shall not charge consumers a surcharge for payment by credit card.

9. Subsequent to its initial meeting with the Office of the Attorney General, PARKSIDE ceased imposing a credit card surcharge on its customers, and has agreed to provide a refund to its customers of all previously imposed surcharges for the period of September 2008 to present within thirty days of the execution of this assurance. These refunds will be made as a credit to the customers' home heating oil account and documentation of these refunds has been provided to the Office o f the Attorney General.

10. PARKSIDE shall maintain, and upon request, make available to the Office of the Attorney General, for one year after the execution of this Assurance, copies of

all contracts that will demonstrate compliance with the requirements of this Assurance.

11. This Assurance concludes the investigation, and precludes any action that the Office of the Attorney General could commence against PARKSIDE and its affiliates for the acts, omissions and practices which are stated in this Assurance, except nothing contained herein precludes the Office of the Attorney General from bringing an action and/or proceeding to enforce PARKSIDE's obligations arising out of or relating to this Assurance.

COMPLIANCE REPORT TO THE ATTORNEY GENERAL

12. IT IS FURTHER AGREED that PARKSIDE shall file with the Office of the Attorney General, no later than sixty days after executing this Assurance, an affidavit, sworn to by a knowledgeable employee of PARKSIDE, attesting that all required refunds have been made and demonstrating that it is in full compliance with the terms of this Assurance.

MISCELLANEOUS

13. Nothing contained herein shall be construed so as to deprive any person of any private right under the law.

14. Pursuant to Executive Law §63(15), evidence of a violation of this of Discontinuance shall constitute *prima facie* proof of a violation of the applicable statutes in any civil proceeding thereafter commenced by the Attorney General.

WHEREFORE, the following signatures affixed hereto this 25 day of June, 2009.

PARKSIDE FUEL, INC.

By: Mike Parisi

President

CONSENTED TO:

ANDREW M. CUOMO
Attorney General of the State of New York

By: Alan B. Berkowitz
Assistant Attorney General

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

DECLARATION OF DONNA ZASOWSKI

Donna Zasowski declares as follows:

1. I am the former owner of K Skee Fuel Oil, a heating-oil company in Centereach, New York. K Skee sold and delivered fuel oil products for residential use.

2. While I was owner, K Skee allowed customers to make purchases using a credit card. Because we incurred a fee whenever a customer paid with a credit card, we began imposing a small charge on those who used credit. We were up front with our customers about this charge, telling them about it over the phone when

informing them of our prices. For example, if someone called asking about the price of oil, we would tell them that it is $2/gallon, plus an additional $.05/gallon fee if paying with credit. We would say that "it's a nickel extra to use a credit card," and they would say "that's fine."

3. In 2009, the New York Attorney General's Office contacted us about our credit-card-fee policy. Assistant Attorney General Alan Berkowitz sent a letter informing us that the fee we were imposing was an unlawful surcharge under New York's No-Surcharge Law (General Business Law § 518).

4. When I spoke with Mr. Berkowitz over the phone, he told me: "You can charge more for a credit card all you want, but you have to say that this is the cash discount rate." He said that we had to tell customers that the regular price is $4.25/gallon, for example, and the cash discount rate is $4/gallon. But we had been saying that "it is a quarter more a gallon" to use a credit card, and we were not allowed to say that.

5. Mr. Berkowitz also told me that we had to provide restitution to our customers who had paid the surcharge even though we told them what we were doing.

6. I did not contest the charges or hire a lawyer because I thought I could not fight the Attorney General. I agreed to stop imposing a surcharge on customers who paid with a credit card. I also agreed to pay a $1,100 fine and restitution to customers who had paid the surcharge.

7. I have been informed that the Attorney General is now claiming that the No-Surcharge Law prohibits only hidden surcharges, and not surcharges that are prominently disclosed to customers before making a purchase. That is not what Mr. Berkowitz told me. He said that I could not impose a "surcharge" at all, but that I could give a cash "discount." He never said anything about being able to impose a surcharge if only I disclosed

that fact to customers, which is what I had been doing before the Attorney General contacted us.

I declare under penalty o f perjury that the foregoing is true and correct.

Dated: Centereach, New York
July 24, 2013

s/ Donna Zasowski
Donna Zasowski

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

DECLARATION OF KEVIN ROONEY

I, Kevin Rooney, do declare as follows:

1. For the past 31 years I have served as the Chief Executive Officer of the Oil Heat Institute of Long Island (OHILI). Incorporated in 1954, OHILI is a not-for-profit trade association which represents the interests of the Long Island heating-oil industry and the consuming public. The members of OHILI are located throughout Nassau and Suffolk Counties, and are mostly small, family-owned companies who have been in business for generations. We are dedicated to improving

our industry, our member companies, and the safety and welfare of the public we serve.

2. In 2009, then New York Attorney General Andrew Cuomo investigated and reached settlements with a number of Suffolk-County-based home heating-oil companies, including some members of OHILI. The Attorney General took the position that these companies had violated the state's No-Surcharge Law (General Business Law § 518), which prohibits merchants from imposing surcharges on consumers who choose to pay with a credit card instead of cash, because the companies charged a separate fee to any customer who made a purchase using a credit card. Had the companies characterized the price difference between using cash and credit as a cash "discount," however, and not a credit "surcharge," they would not have been in violation of the No-Surcharge Law. As part of the settlements, the companies agreed to stop imposing "a surcharge for payment by credit card." And the Attorney General required them to make refunds and, in some cases, pay fees and costs to the state.

3. Based on that experience, and the manner in which then Attorney General Cuomo enforced the No-Surcharge Law against our members, it is our understanding that the law turns on a semantic distinction in how a company characterizes the added cost of using a credit card. If the company calls it a credit "surcharge," the Attorney General can bring an enforcement action against them for violating the law, as it did against some of OHILI's members. If the company calls it a cash "discount," however, no action against the company is taken. That is also how OHILI's members and other heating-oil companies understand the law to work. It prevents them from saying that there is a 2% or 3% surcharge on heating oil, even if they disclose the surcharge prominently.

4. I have been made aware that the Office of the Attorney General is now saying that the No-Surcharge Law is not an outright ban on surcharges, but is really just a false-advertising law. That is news to me. I have never heard the Attorney General or anyone else claim that it is lawful for a merchant to impose a surcharge, as long as the charge is prominently disclosed. In fact, the Attorney General told companies, including OHILI members, that they had to call the charge a cash "discount," and was quoted as saying this in press accounts at the time. And the Attorney General secured settlements barring merchants from imposing surcharges, however prominently they were disclosed.

5. On its face, the No-Surcharge Law is bad public policy. Using a credit card costs money, and someone has to bear that cost. In our industry, the difference between a customer paying with a credit card and paying by cash or check can be as much as 5 to 10 cents per gallon. That might be this amount is almost equal to our members' after-tax profit margin. Allowing our members to label the inherent cost of a credit card transaction as a separate "surcharge"...(so that consumers know exactly what they are paying for by using a credit card and can therefore choose whether to use cash if they wish)...would enhance the transparency of the financial transaction to the benefit of both our members' businesses and their customers.

I declare, under penalty of perjury, that the foregoing is true and correct.

Dated: Happauge, New York

July 24, 2013

s/ Kevin Rooney

Kevin Rooney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

DECLARATION OF NICHOLAS J. DAMADEO

I, Nicholas J. Damadeo, do declare:

1. I am a member in good standing of the New York Bar. I serve as General Counsel to the New York Oil Heating Association and General Counsel to the Oil Heat Institute of Long Island, both of which represent full-service heating oil companies in New York State. I also represent many heating oil companies—both members and non-members of those two organizations. To my knowledge, all of these companies take credit cards.

2. In 2009, the New York Attorney General launched an investigation into alleged violations of the state's credit card surcharge law (General Business Law 518) by many heating-oil companies, including some of my clients. This investigation was the first time my clients had any issue involving the no-surcharge law. We had no involvement with the surcharge law until then because there had been no known consumer complaints about the issue. I would have known if there had been any consumer complaints because it was my job to review them.

3. As a result of the investigations, I believe the Attorney General obtained agreement from all of the companies involved to stop imposing credit-card surcharges.

4. Based on my experience during these investigations, including conversations with representatives of the Attorney General's office, it is my understanding that the no-surcharge law turns on nothing but semantics. The law permits "discounts" for cash but prohibits "surcharges" for credit, even though they are the same thing. I have thought a great deal about the topic and I cannot discern any meaningful difference between a surcharge and a discount. If a gas station, for example, posts both a credit-card price and a cash price, is it offering a surcharge or a discount?

5. As a result of these experiences, I have counseled my clients that, when they are called over the phone and asked for their price, they should quote the price including the amount of the credit-card surcharge and then explain that a cash "discount" from that price is available. But they cannot quote a price and then explain that it is five cents more to use a credit card. In other words, "five cents less for cash" is okay but "five cents more for credit" is not. It has everything to do with how

you say it. Most of my clients now offer cash "discounts" instead of credit-card "surcharges".

6. The New York no-surcharge law makes no rational sense because compliance is based upon semantics and not upon conduct. It regulates absolutely no conduct whatsoever. It is akin to a law that says it is acceptable to say that a glass is "half full" but criminalizes a description of the same glass as "half empty."

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Huntington, New York on July 25, 2013.

s/ Nicholas J. Damadeo

Nicholas J. Damadeo

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EXPRESSIONS HAIR DESIGN, LINDA FIACCO, THE BROOKLYN FARMACY & SODA FOUNTAIN, INC., PETER FREEMAN, BUNDA STARR CORP., DONNA PABST, FIVE POINTS ACADEMY, STEVE MILLES, PATIO.COM LLC, and DAVID ROSS, *Plaintiffs*, v. ERIC T. SCHNEIDERMAN, in his official capacity as Attorney General of the State of New York, *Defendant*.	No. 13-CIV-3775 (JSR)

DECLARATION OF JOHN CONOVER

John Conover declares as follows:

1. I am the owner of Southville Petroleum, a registered diesel and heating-oil company based in East Northport, New York. Southville sells and delivers heating oil and diesel fuel products for residential and commercial purposes.

2. Southville prides itself on providing quality service to our customers. In keeping with this, we give customers the option of paying for purchases with a credit card. Providing this option isn't free. Whenever a

customer uses a credit card, we incur a cost, usually between 2% and 3% of the purchase price, which is a significant expense for a small business in an industry like ours.

3. Several years ago, in an effort to reduce this expense, we began imposing a small fee on credit-card transactions. We expressed this fee as a price per gallon. For instance, if a customer called asking about our prices, we would tell them that we charge $2.99/gallon for oil, with an additional charge of $.03/gallon if the customer pays with a credit card. We charged between $.03/gallon and $.05/gallon to customers who paid with a credit card, depending on our costs. We always informed the customer what the charge would be.

4. In 2009, we received an anonymous call from someone asking about our prices. One of our employees informed the person of our prices, and then told them that we charge "three cents per gallon more" for a credit card purchase. After that phone call, the Attorney General's office notified us that we were imposing an illegal surcharge under New York's No-Surcharge Law, General Business Law § 518. On June 25, 2009, I met with Alan B. Berkowitz, Acting Assistant Attorney General.

5. On June 25, 2009, I met with Alan B. Berkowitz, Assistant Attorney General. Mr. Berkowitz explained to me that Southville would have to stop imposing a surcharge on credit-card transactions, provide restitution to customers who had paid the charge, and pay a fine to the state. I did not contest the charges or hire a lawyer, and I signed an Assurance of Discontinuance agreeing to comply with the Attorney General's demands, including its demand that we not charge customers a surcharge for payment by credit card.

6. I have recently been informed that the Attorney General is now claiming that the No-Surcharge Law is aimed only at false advertising—that it just prohibits deceptive surcharges, not all surcharges. But that is not what the Attorney General's Office told us in 2009. We were targeted because we said that we charge "three cents per gallon more" for using a credit card. We were never told that we could impose a credit-card surcharge if only we told customers about this ahead of time. In fact, every customer who paid a surcharge was well aware of it, and could have made a decision to use cash or check to avoid paying the charge.

7. To this day, I don't charge differently for cash or credit. The law is too convoluted. I just calculate the cost of accepting credit and incorporate that cost into my products, whether customers pay by cash, check or card.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: East Northport, New York
July 25, 2013

s/ John Conover

John Conover

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

----------X

In the Matter of AOD#
NAPCO OIL HEAT CORP.

----------X

ASSURANCE OF DISCONTINUANCE PURSUANT TO EXECUTIVE LAW § 63(15)

Pursuant to the provisions of Article 22-A of the General Business Law and §63(12) of the Executive Law, ANDREW M. CUOMO, Attorney General of the State of New York caused an inquiry to be made into the business practices of NAPCO OIL HEAT CORP. ("NAPCO"), and based upon that inquiry makes the following findings:

FINDINGS

1. NAPCO is a New York corporation located at 133 Cortland Street, Lindenhurst, NY, 11757. NAPCO is engaged in the business of providing home heating oil and services in the State of New York.

2. NAPCO has been providing home heating oil and services for a number of years.

3. In conducting its home heating business, NAPCO uses various types of contracts. The Attorney General's inquiry relates to the home heating oil delivery for the 2008-2009 season. In setting its price for fuel oil, NAPCO regularly imposed a surcharge on consumers who chose to use a credit card as opposed to paying by cash or check.

4. Under General Business Law §518, no seller in any sales transaction may impose a surcharge on a purchaser who elects to use a credit card in lieu of payment by cash, check, or similar means. An investigation by the Office of the Attorney General

reveals that consumers were regularly and routinely charged these illegal surcharges by NAPCO.

5. By reason of the foregoing, the Attorney General asserts that PARKSIDE has engaged in conduct which violates General Business Law §518.

ASSURANCE

6. IT NOW APPEARS that NAPCO desires to settle and resolve the investigation. Accordingly, the Attorney General and NAPCO hereby enter into this Assurance of Discontinuance.

7. IT IS HEREBY UNDERSTOOD AND AGREED by NAPCO, its officers, directors, agents, employees and assignees, and any individual or entity through which NAPCO may now or hereafter act, as follows:

8. NAPCO shall not enforce provisions of any contract or any contract that includes a credit card surcharge in violation of General Business Law §518. Furthermore, NAPCO shall not charge consumers a surcharge for payment by credit card.

9. In consideration of the making and execution of this Assurance, and within one-hundred and eighty days thereafter, NAPCO agrees that is will pay by wire transfer, certified check or bank check payable to the State of New York $3,000 in penalties, fees and costs.

10. Subsequent to its initial meeting with the Office of the Attorney General, NAPCO ceased imposing a credit card surcharge on its customers, and has agreed to provide a refund to its customers of all previously imposed surcharges for the period of September 2008 to present within thirty days of the execution of this assurance. These refunds will be made as a credit to the customers' home heating oil account and documentation

of these refunds has been provided to the Office of the Attorney General.

11. NAPCO shall maintain, and upon request, make available to the Office of the Attorney General, for one year after the execution of this Assurance, copies of all contracts that will demonstrate compliance with the requirements of this Assurance.

12. This Assurance concludes the investigation, and precludes any action that the Office of the Attorney General could commence against NAPCO and its affiliates for the acts, omissions and practices which are stated in this Assurance, except nothing contained herein precludes the Office of the Attorney General from bringing an action and/or proceeding to enforce NAPCO's obligations arising out of or relating to this Assurance.

COMPLIANCE REPORT TO THE ATTORNEY GENERAL

13. IT IS FURTHER AGREED that NAPCO shall file with the Office of the Attorney General, no later than sixty days after executing this Assurance, an affidavit, sworn to by a knowledgeable employee of NAPCO, attesting that all required refunds have been made and demonstrating that it is in full compliance with the terms of this Assurance.

MISCELLANEOUS

14. Nothing contained herein shall be construed so as to deprive any person of any private right under the law.

15. Pursuant to Executive Law §63(15), evidence of a violation of this of Discontinuance shall constitute *prima facie* proof of a violation of the applicable statutes in any civil proceeding thereafter commenced by the Attorney General.

WHEREFORE, the following signatures affixed hereto this 25 day of June, 2009.

NAPCO OIL HEAT CORP.
By: Robert Nappe
President

CONSENTED TO:

ANDREW M. CUOMO
Attorney General of the State of New York

By: Alan B. Berkowitz
Assistant Attorney General

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

----------X

In the Matter of AOD#

ROCKY & MARCIANO FUEL OIL, INC.

----------X

ASSURANCE OF DISCONTINUANCE PURSUANT TO EXECUTIVE LAW § 63(15)

Pursuant to the provisions of Article 22-A of the General Business Law and §63(12) of the Executive Law, ANDREW M. CUOMO, Attorney General of the State of New York caused an inquiry to he made into the business practices of ROCKY & MARCIANO FUEL OIL, INC. ("ROCKY & MARCIANO"), and based upon that inquiry makes the following findings:

FINDINGS

1. ROCKY & MARCIANO is a New York corporation located at 971 Unit E, Holbrook, NY, 11741. ROCKY & MARCIANO is engaged in the business of providing home heating oil and services in the State of New York.

2. ROCKY & MARCIANO has been providing home heating oil and services for a number of years.

3. The Attorney General's inquiry relates to the home heating oil delivery for the 2008-2009 season. In setting its price for fuel oil, ROCKY & MARCIANO regularly imposed a surcharge on consumers who chose to use a credit card as opposed to paying by cash or check.

4. Under General Business Law §518, no seller in any sales transaction may impose a surcharge on a purchaser who elects to use a credit card in lieu of payment by cash, check, or similar means. An investigation by the Office of the Attorney General

reveals that consumers were regularly and routinely charged these illegal surcharges by ROCKY & MARCIANO.

5. By reason of the foregoing, the Attorney General asserts that ROCKY & MARCIANO has engaged in conduct which violates General Business Law §518.

ASSURANCE

6. IT NOW APPEARS that ROCKY & MARCIANO desires to settle and resolve the investigation. Accordingly, the Attorney General and ROCKY & MARCIANO hereby enter into this Assurance of Discontinuance.

7. IT IS HEREBY UNDERSTOOD AND AGREED by ROCKY & MARCIANO, its officers, directors, agents, employees and assignees, and any individual or entity through which ROCKY & MARCIANO may now or hereafter act, as follows:

8. ROCKY & MARCIANO shall not enforce provisions of any contract or any contract that includes a credit card surcharge in violation of General Business Law §518. Furthermore, ROCKY & MARCIANO shall not charge consumers a surcharge for payment by credit card.

9. In consideration of the making and execution of this Assurance, and within one-hundred and eighty days thereafter, ROCKY & MARCIANO agrees that is will pay by wire transfer, certified check or bank check payable to the State of New York $4000 in penalties, fees and costs.

10. Subsequent to its initial meeting with the Office of the Attorney General, ROCKY & MARCIANO ceased imposing a credit card surcharge on its customers, and has agreed to provide a refund to its customers of all previously imposed surcharges for the period of

September 2008 to present within thirty days of the execution of this assurance. These refunds will be made as a credit to the customers' home heating oil account and documentation of these refunds has been provided to the Office of the Attorney General.

11. ROCKY & MARCIANO shall maintain, and upon request, make available to the Office of the Attorney General, for one year after the execution of this Assurance, copies of all contracts that will demonstrate compliance with the requirements of this Assurance.

12. This Assurance concludes the investigation, and precludes any action that the Office of the Attorney General could commence against ROCKY & MARCIANO and its affiliates for the acts, omissions and practices which are stated in this Assurance, except nothing contained herein precludes the Office of the Attorney General from bringing an action and/or proceeding to enforce ROCKY & MARCIANO's obligations arising out of or relating to this Assurance.

COMPLIANCE REPORT TO THE ATTORNEY GENERAL

13. IT IS FURTHER AGREED that ROCKY & MARCIANO shall file with the Office of the Attorney General, no later than sixty days after executing this Assurance, an affidavit, sworn to by a knowledgeable employee of ROCKY & MARCIANO, attesting that all required refunds have been made and demonstrating that it is in full compliance with the terms of this Assurance.

MISCELLANEOUS

14. Nothing contained herein shall be construed so as to deprive any person of any private right under the law.

15. Pursuant to Executive Law §63(15), evidence of a violation of this Assurance of Discontinuance shall

constitute *prima facie* proof of a violation of the applicable statutes in any civil proceeding thereafter commenced by the Attorney General.

WHEREFORE, the following signatures affixed hereto this 17 day of July, 2009.

ROCKY & MARCIANO FUEL OIL, INC.
By: Eileen Marciano
President

CONSENTED TO:

ANDREW M. CUOMO
Attorney General of the State of New York

By: Alan B. Berkowitz
Assistant Attorney General

Attorney General Cuomo Issues Consumer Alert For Nyc Drivers After Investigation Reveals Nearly 25% Of Nyc Area Gas Stations Inspected Engaged In Deceptive Practices

NEW YORK, N.Y. (August 28, 2008) - With New York City drivers hitting the road for Labor Day weekend, Attorney General Andrew M. Cuomo today issued a consumer alert after his office's undercover investigation into the sale of gasoline found that approximately one-fourth of New York City area gas stations engage in deceptive practices, including wrongfully surcharging credit card customers. Cuomo's statewide investigation discovered that New York City, along with the Long Island region, has far more gas stations that illegally overcharge customers for gas than any other region in the state. Under New York State law, retailers are not allowed to impose a surcharge on customers for using a credit card.

In addition, Cuomo's investigation also identified instances where gas stations across the five boroughs engaged in false advertising by only listing the lower cash prices on their street-view signage in order to lure patrons to the pump. In several cases, the stations failed to disclose that the price was only for cash transactions. Once at the pump, consumers discovered that they were charged more for using a credit card - a deceptive "bait and switch" practice.

Today, Cuomo warned drivers across the New York City area to be on the guard for gas stations that overcharge credit card users at the pump. His office is also in the process of sending "cease-and-desist" letters to approximately 30 gas stations across the city that were found to be engaged in deceptive and unlawful practices, and is following up on the hundreds of

consumer complaints it received since the investigation was announced last week on Long Island.

"With drivers hitting the road this weekend and gas prices through the roof, the last thing New York City drivers need are gas stations hitting them with exorbitant prices for paying with a credit card," said Attorney General Cuomo. "Drivers across New York City need to be on the guard for gas stations that engage in deceptive practices to squeeze every last dollar out of their customers. Our investigation revealed that New York City is rife with gas stations that engage in deceptive practices where they display one price as a way to lure customers - and then charge them more at the pump."

Attorney General Cuomo's office conducted an investigation that inspected approximately 130 gas stations across the city and found that approximately one-fourth of gas stations were engaged in deceptive practices by either charging customers more for using a credit card, or by posting only the lower cash prices on their large, street-facing signs in order to lure patrons to their station and then charging them more at the pump.

Cuomo noted that customers who use credit cards already pay a premium to the credit card company. An additional "usage fee" at the pump doubly penalizes the customer. The investigation also determined that by withholding the higher credit card price until the consumer has already parked at the pump, the stations mislead consumers and prevent honest comparative price shopping from the street. Some gas stations did include the word "cash" in small letters on the large signs, but the word was too small or faint to read from the street.

This behavior comes at a time when reports show that gasoline prices this summer are more than 32 percent higher than they were last summer.

The Automobile Association of America (AAA)'s Director of Government Affairs, John A. Corlett, said, "The AAA commends Attorney General Cuomo for undertaking this initiative. AAA is a proud partner in this fight. His warning to the stations engaging in this deceptive act is a welcome service to drivers who desperately need relief at the gas pump."

Consumers who see gas stations prominently advertising the cash-only price on primary signage and then indicating at the pump that credit card customers will be charged more are urged to contact the Attorney General's Consumer Helpline at 1-800-996-4630.

The investigation is being conducted by Darcy Goddard, Assistant Attorney General, Kate Burson, Assistant Attorney General, Deputy Chief Investigator Thomas Richardson, Supervisor Investigator Georgia Nurse, Investigator Paul Matthews, Investigator William Lightbody, and Investigator Andre Job.

Attorney General Cuomo Announces Investigation Revealing Nearly One-third Of Long Island Gas Stations Inspected Engaged In Deceptive Practices

MINEOLA, N.Y. (August 21, 2008) - Attorney General Andrew M. Cuomo today announced that an ongoing investigation by his office into the sale of gasoline has found that approximately one-third of Long Island gas stations surveyed engaged in deceptive practices, including wrongfully surcharging credit card customers. Cuomo's statewide investigation discovered that the Long Island region has far more gas stations that illegally overcharge customers for gas than any other region in the state. Under New York State law, retailers are not allowed to impose a surcharge on customers for using a credit card.

In addition, Cuomo's investigation also identified instances where gas stations across Long Island engaged in false advertising by only listing the lower cash prices on their street-view signage in order to lure patrons to the pump. In several cases, the stations failed to disclose that the price was only for cash transactions. Once at the pump, consumers discovered that they were charged more for using a credit card - a deceptive "bait and switch" practice.

Today, Cuomo announced that his office is in the process of sending "cease-and-desist" letters to approximately 43 gas stations that were found to be engaged in deceptive and unlawful practices.

"With summer gas prices reaching an all-time high, the last thing Long Island drivers need are gas stations hitting them with exorbitant prices for paying with a credit card," said Attorney General Cuomo. "Our investigation revealed that Long Island is a hotbed for gas stations that engage in deceptive practices where

they display one price as a way to lure customers - and then charge them more at the pump."

Attorney General Cuomo's office conducted an investigation that inspected approximately 120 gas stations in Nassau and Suffolk counties and found that an estimated one-third of gas stations were engaged in deceptive practices by either charging customers more for using a credit card, or by posting only the lower cash prices on their large, street-facing signs in order to lure patrons to their station and then charging them more at the pump.

Attorney General Cuomo Announces Nationwide Investigation Into Debt Settlement Industry

ALBANY, N.Y. (May 8, 2009) Attorney General Andrew M. Cuomo today announced that his office has reached settlements with six New York-based home heating oil companies serving the Hudson Valley, Catskills, Southern Tier and North Country for various violations over the past year, including improperly adding surcharges for credit card payments and failing to provide required notifications to consumers.

The agreements with Paraco Gas Corporation, Depew Oil Company, Inc., Vaincourt Fuels, Wilson Oil, Kuno Oil and Russo Fuel end various deceptive practices and provide refunds to more than 500 consumers who were wrongfully charged, as well as penalties and costs to the state.

"Home heating costs account for a substantial portion of most hard-working New Yorkers household budgets, and any illegitimate or surprise costs added to the bill are unacceptable," said Attorney General Cuomo. "It is particularly disturbing when companies take advantage of consumers purchasing such a basic and needed service. I continue to urge all consumers to thoroughly review contracts before signing and to alert my office if they believe they are being subjected to misleading or deceptive acts."

Rye Brook-based Paraco Gas Corporation services approximately 65,000 customers and has offices in the Hudson Valley, Catskills and Southern Tier. The Attorney General's Office found that Paraco sent deceptive contracts that may have led consumers to believe they were signing up for fuel delivery for the 2008-2009 heating season only. However, the contracts constituted a 7-year commitment. The company also

failed to notify customers in advance over automatic contract renewals.

The Attorney General's agreement requires Paraco to reform its practices and contract language and pay $12,000 in penalties and costs to the state. The agreement also prohibits Paraco from penalizing customers who did not receive adequate notification of contract renewal and wish to cancel service.

Attorney General Cuomo's Office also found that Newburgh-based DePew Oil Company, Inc. improperly charged a 2 percent service charge on credit card payments. State law prohibits a surcharge on the use of a credit card for purchases. After intervention by the Attorney General's Office, DePew stopped the practice and paid $6,970.47 in refunds.

Vaincourt Fuels, based in Malone, sells home heating oil, kerosene and related services in the North Country. Vaincourt entered into a settlement with the Attorney General's Office requiring the company to immediately stop engaging in deceptive debt collection practices and pay $5,000 in penalties and costs to the state. In an attempt to collect on overdue payments, the Attorney General's Office found that the company sent collection letters that included:

- A statement that gives the appearance that Vaincourt had an established relationship with a local court and that a judgment in its favor would be automatic. For instance: "We will take you to Westville Town Court. This will cost you approximately $100-$200 more than what you owe. The Judge will award the judgment to Vaincourt Fuels."
- Improperly suggesting that Vaincourt has a relationship with the customer's employer and has successfully garnished wages through them

before. For instance: "It has been effective for us in the past to have wages garnished through your current employer."

The Attorney General's Office also determined that three other home heating fuel companies were also illegally charging surcharges for credit card payments:

- Wilson Oil, located in Beacon, wrongfully charged 41 customers surcharges for oil deliveries paid for with credit cards. After the Attorney General's involvement, the company refunded the charges, totaling $678.30.
- Kuno Oil, based in Canton, improperly charged surcharges to 26 customers, totaling $496.26. Upon the Attorney General's intervention, the company agreed to refund the charges to customers.
- Russo Fuel, Inc, located in Highland, wrongfully charged surcharges to six customers for fuel deliveries. Once the Attorney General contacted the company, Russo refunded a total of $163.10 to the customers who were charged.

The three companies have all agreed to no longer charge surcharges for credit card payments.

Consumers who believe they have been subjected to fraud or deceptive practices are urged to contact the Attorney General's Office at 800-771-7755. Contact information for local regional offices can be found online at www.ag.ny.gov.

Attorney General Cuomo Stops Oneida County Used Car Dealer From Overcharging For Dmv Registration Fees And Implementing Surcharges On Credit Card Purchases

UTICA, N.Y. (June 1, 2009) - Attorney General Andrew M. Cuomo today announced an agreement with an Oneida County-based used car dealership that ends its years-old practice of overcharging customers for Department of Motor Vehicle (DMV) registration fees and then failing to refund leftover money. The dealership was also improperly charging surcharges on purchases made with a credit card.

As part of the agreement with Attorney General Cuomo's Office, Auto One Group, Inc, located on State Route 233 in Clinton, and its owner Matthew Crever, must fully refund consumers who were overcharged for DMV registration fees and pay $30,000 in civil penalties to New York. The Attorney General's Office estimates up to 1,000 consumers are owed restitution that could total $50,000.

"This company raked in tens of thousands of dollars by falsely inflating vehicle registration fees in an effort to dupe unsuspecting consumers," said Attorney General Cuomo. "Slipping in deceptive and hidden fees into the purchase price of any item, including automobiles, will not go unchecked by my office."

Like many dealerships, as a method of convenience, Auto One offered customers the opportunity to pay their DMV registration fee directly to the dealership since 2006. The dealership typically charged customers a $150 fee for registration for vehicles purchased without a trade-in and $110 for vehicles purchased with a trade-in.

The DMV typically charges $50 for a New York State Certificate of Title, $49.50 for registration for two years (slightly varying depending on the weight of the vehicle)

and $15 for license plates. For purchases with trade-ins, purchases normally carry a $50 charge for certificate of title, $7.75 for the transfer of existing registration to the new vehicle and an amount to cover the difference in weight between the two vehicles.

Overall, consumers electing for this service were typically charged anywhere from $15 to $52 above the actual cost of registering a vehicle. Based upon the number of customers Auto One served, the aggregate dollar amount could reach $50,000.

In addition to refunding consumers and ending the overcharges, Auto One must stop from imposing a surcharge for the use of credit cards, which is illegal under New York General Business Law.

As part of the agreement, Auto One must hire an independent Certified Public Accountant to ensure that eligible consumers are properly refunded. Consumers who believe they have been overcharged are urged to contact Attorney General Cuomo's Utica Regional Office at (315) 793- 2225.

The case was handled by Assistant Attorney General In-Charge of the Utica Regional Office Joel Marmelstein with assistance from Investigator Joseph Kelly and DMV Senior Investigator Grace Isgro.

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

June 2, 2011

Via Certified Mail—Return Receipt Requested

Mr. Moan S. Chhhokatr
Rajit Inc.
Valero Gas Station
262 Arsenal Street
Watertown, NY 13601

Cease & Desist

Dear Mr. Chhokatr:

It has come to the attention of the New York State Attorney General's Office that the Valero Gas Station at 262 Arsenal Street, Watertown, New York, has been posting gasoline prices which, in small print, are limited to cash sales only. The roadside listing of a price without equally prominent disclosure of the higher standard price for credit purchases violates the New York Executive Law 63(12) prohibition against deceptive acts and practices, as well as the General Business Law 349 prohibition against deceptive business practices.

Complaints from consumers lured into gas stations based upon the low roadside posting only to find that the price only applies to cash payments, confirm that consumers are being detrimentally misled by this style of signage. It is the opinion of this office that these inadequacies constitute deceptive practices as prohibited by New York State Executive Law 63(12) and General Business Law section 349.

Please confirm that your business has discontinued roadside advertising of a limited cash pricing without

similarly posting the credit price, and ***immediately cease and desist utilization of the marketing solicitation*** in the format described. Kindly advise within 5-days as to what steps your business has taken to remedy the above-cited deficiency.

Thank you for your anticipated cooperation.

Very truly yours,

Deanna R. Nelson
Assistant Attorney General
In-Charge
Office of NYS Attorney General
Eric T. Schneiderman